

From: Jim Trakas
To: AskOE
Subject: RE: Please Invoke Section 202 (C) for First Energy's Three Nuclear Power Plants
Date: Tuesday, May 01, 2018 12:34:36 PM

Dear Sir or Madam:

I write as the Public Utilities Chairman of the City of Independence, Ohio, a community that relies upon stable power supply from its energy suppliers, including First Energy, whom had once been headquartered in our community. I ask that the Secretary of Energy invoke Section 202 (C) to save our nuclear power plants that provide security and stability to Ohio and Pennsylvania consumers.

For several reasons, the extraordinary power associated with Section 202 (C) should be invoked:

1. I fear that shuttered nuclear power plants are a safety risk and an appetizing target for terrorism, which would meet the national security definition associated with a 202 (C) action. Many credible threats have come in as to terrorists wishing to attack America, either from within or overseas threats. Having three shuttered nuclear plants in this region make for ripe targets of opportunity, and we should not afford terrorists those opportunities.

We know that Al Queda, ISIS, and other Moslem terrorists have targeted nuclear power plants. President George W. Bush stated the threat in 2002, and that U.S. intelligence found diagrams of U.S.A. nuclear power plants in Afghanistan. Terrorists in Belgium were plotting an attack on a nuclear power plant.

Due to good intelligence and vigilance, these attacks were thwarted, but should we actually shut down plants, it makes them even more vulnerable to attack and opens our region up to a ripe target, something that should be avoided from a national security perspective.

2. The United States of America continues to be at war with terrorists, foreign and domestic since 14 SEP 01, under Public Law 107-40, which is still in affect. (b) (6)

unit drills monthly to assist civilian authority in case of attack. Forces of the United States of America are deployed all around the globe, but particularly in Afghanistan, where threats to America's nuclear power plants have been evidenced and continue to be evidenced. Our enemies are constantly plotting the demise of the nation during the Global War on Terror, and the authorization of force granted President Bush and his successors, are still in force. We are in a state of war against terrorists, and terrorists desire to destroy America's nuclear power plants. It is highly relevant to our national security strategy for maximum defense of our nuclear industry.

3. Should America be forced to defend itself in another war with more substantial deployments, nuclear power is certainly a strategic asset to our national defense industry. Current forms of energy would be scarce, and having stable and secure nuclear power must be a part of our national security strategy.

We are fortunate to have coal, natural gas, wind, and sun, but in times of war, keeping the factories of America going for the arsenal of democracy needs all available options. It would take years or months to re-establish a nuclear power facility, time that in times of armed attack, the U.S.A. simply does not have. Nuclear is a key to our national defense industry and essential to the 202 (C) process that I am advocating for.

There are very valid civilian reasons to continue the use of nuclear power, including the research that benefits our national defense, but your task is to declare First Energy's nuclear plants as national defense resources, which they are.

My claims are backed by factual evidence according to national security experts, and known terrorist attacks and thwarted attacks.

I ask you to use the authority at your discretion to declare First Energy's nuclear power plants as national security strategic assets and invoke section 202 (C) as soon as is possible.

Respectfully submitted,

Jim
James P. Trakas
Councilman At Large
Chairman, Utilities and Sewers Committee
Member, Public Buildings and Lands; Community Services



Calpine Corporation

THAD HILL
President & Chief Executive Officer
Calpine Corporate Office
717 Texas Avenue, Suite 1000
Houston, TX 77002
713-830-2000

May 2, 2018

VIA ELECTRONIC MAIL AND U.S. MAIL

The Honorable James Richard Perry
Secretary of Energy
U.S. Department of Energy
1000 Independence Avenue, S.W.
Washington, D.C. 20585

Dear Secretary Perry:

Calpine Corporation ("Calpine") is writing to express grave concerns regarding your consideration of action to economically prop up, through subsidies or otherwise, coal and nuclear plants in the PJM Interconnection, L.L.C. ("PJM") region through the use of emergency powers under Section 202(c) of the Federal Power Act (the "FPA"),¹ or any other statute, including the Defense Production Act (the "DPA")² or the Fixing America's Surface Transportation Act (the "FAST Act").³ We understand that you are considering this action as evidenced by the establishment of the DOE portal for the receipt of materials related to FPA Section 202(c), and as a result of the March 29, 2018 application by FirstEnergy Solutions Corp. and its subsidiaries (together, "FES") seeking an emergency order under Section 202(c).

The competitive power markets have delivered billions of dollars in new, private investment, leading to lower prices to consumers for almost two decades. The foundation on which this success has been built is America's belief in open markets. Participants in these markets need to compete on a level playing field. The proposed actions would tilt the table and not only undermine, but potentially destroy, new private competitive investment, and perhaps more importantly, substantially add to the cost of power to consumers in the region. It also will harm the natural gas industry by reducing demand for this beneficial and abundant fuel source. Mr. Secretary, there is no crisis or national threat that justifies such action.

¹ 16 U.S.C. § 824a(c).

² 50 U.S.C. § 4501, *et seq.*

³ Pub. L. No. 114-94.

Introduction

Calpine is an independent power producer that has approximately 27,000 megawatts of generation in operation or under construction in 18 states and Canada. Backed by a fleet of advanced-technology power plants, Calpine's retail operations also provide access to clean, flexible and reliable resources in competitive markets throughout the United States. As both a producer and a provider of electricity operating in 25 states, Calpine has strongly supported efforts by Congress, the Federal Energy Regulatory Commission ("FERC"), and regional transmission organizations ("RTOs") and independent system operators ("ISOs") to implement competitive wholesale markets. By encouraging entrepreneurialism, these markets have lowered costs for consumers, while avoiding the inefficiencies that historically resulted from central planning and having the government pick winners and losers.

The Requested Action Would Harm Competitive Markets

On March 29, 2018, FES filed an application with you requesting an emergency order under Section 202(c) of the FPA requiring PJM to provide massive subsidies to nuclear and coal-fired generation facilities, including those owned by FES (the "FES Request").⁴

Calpine is seriously concerned about the unprecedented harm that FES's request would have on PJM's competitive power market. PJM's market relies on competition between suppliers to lower costs and promote efficiency, while encouraging the retirement of less efficient generation facilities. But FES now asks the Secretary to undercut this competitive framework by ordering PJM to pay "cost-based rates that provide for full cost recovery" to certain nuclear and coal-fired generation facilities in PJM that have proven to be uneconomic.⁵ These requested subsidies would render a substantial portion of the generation in PJM completely immune to market signals, which is anathema to market principles. As a result:

- Older, inefficient facilities would remain in the market; and
- Subsidized facilities can be expected to offer their energy and capacity at prices that are at or close to zero because they are "guaranteed" payment, thereby depressing market prices.
 - PJM recently explained that only a small amount of subsidized generation will have significant impacts on clearing prices. For example, adding 6,000 megawatts of subsidized generation submitting zero-priced offers in the

⁴ Calpine understands that the Secretary has not yet established notice and comment procedures with respect to the FES Request. See Department of Energy, Office of Electricity Delivery & Energy Reliability, DOE's Use of Federal Power Act Emergency Authority, <https://www.energy.gov/oe/services/electricity-policy-coordination-and-implementation/other-regulatory-efforts/does-use>. Accordingly, Calpine is not addressing each of the numerous flaws in the FES Request at this time, and is instead submitting this letter to highlight at a high level the irrevocable and severe harm that would result if FES's request is granted.

⁵ FES Request at 31.

“Outside MAAC” portion of PJM would represent only four percent of the supply in that area, but would be expected to decrease clearing prices for capacity by as much as 21 percent.⁶

- At the same time, adding only 2,000 MW of subsidized, zero-priced generation in the EMAAC Locational Deliverability Area of PJM would reduce clearing prices by a full third.⁷
- Given that coal-fired generating facilities make up 33 percent of the generation in PJM, and nuclear generating facilities make up another 18 percent of PJM’s generation,⁸ the impact of the requested subsidies on PJM’s clearing prices will be devastating.

It merits emphasis that, by impacting market prices, the requested subsidies for nuclear and coal facilities will engender the need for additional subsidies to support other classes of resources. Lowered clearing prices will result in non-subsidized generators being squeezed out of the market, even if they are more efficient than the subsidized nuclear and coal facilities. In particular, gas generators that are wholly dependent on market revenues will either not clear in PJM’s energy and capacity markets or, even if they do clear, will not receive sufficient revenues to cover their operating costs. Loss of gas generation will, in turn, harm consumers – not only is generation fueled by natural gas highly efficient, but it also provides quick-ramping capability that is necessary to maintain grid reliability in the face of increased usage of renewable resources that have highly variable generation output.⁹ Accordingly, gas generators that are not able to survive on the depressed market prices can be expected to request that the Secretary provide them with similar subsidies under Section 202(c) of the FPA or otherwise. Depressed market prices will also discourage the development of new generating facilities to meet demand, and likely mean that new facilities will only be developed with guaranteed cost support. In short, the FES Request would, if granted, strangle the vibrant competitive markets that have provided benefits for consumers, and necessitate a return to the inefficiencies of traditional cost-based ratemaking.

⁶ Capacity Repricing or in the Alternative MOPR-Ex Proposal: Tariff Revisions to Address Impacts of State Public Policies on the PJM Capacity Market, Attachment E, Affidavit of Adam Keech on behalf of PJM Interconnection, L.L.C., ¶ 7, FERC Docket No. ER18-1314-000 (filed Apr. 9, 2018).

⁷ *Id.*, ¶ 8.

⁸ See PJM Interconnection, L.L.C., *PJM’s Evolving Resource Mix and System Reliability* (Mar. 30, 2017), at 9, <http://www.pjm.com/~media/library/reports-notice/special-reports/20170330-pjms-evolving-resource-mix-and-system-reliability.ashx>.

⁹ See, e.g., U.S. Department of Energy, *Staff Report to the Secretary on Electricity Markets and Reliability* (Aug. 2017), at 11 (“DOE Report”), https://www.energy.gov/sites/prod/files/2017/08/f36/Staff%20Report%20on%20Electricity%20Markets%20and%20Reliability_0.pdf; The Brattle Group, *Diversity of Reliability Attributes, A Key Component of the Modern Grid* (May 17, 2017), at 3, https://sites.hks.harvard.edu/hepg/Papers/2017/Brattle_20170517-API-Diversity-of-Attributes.pdf.

FES also has failed to substantiate its claims that an “emergency condition” exists in PJM.¹⁰ As FERC has already determined, after reviewing thousands of pages of comments and evidence submitted by various parties (including FES), there is no basis for FES’s claims that past or planned retirements of nuclear and coal facilities have resulted in a threat to reliability or resilience in PJM or elsewhere.¹¹ PJM has also confirmed that there is no immediate threat to system reliability,¹² and that PJM did not have to rely on coal-fired generating units to avoid blackouts during a prolonged cold snap from December 27, 2017 to January 7, 2018, but voluntarily chose to do so because the cost of coal was lower than the cost of natural gas during that time.¹³ In fact, evidence demonstrates that the nuclear and coal retirements identified in the FES Request are expected and warranted given the age and relative inefficiency of such facilities.¹⁴

In light of the lack of an immediate threat in PJM, Calpine strongly urges the Secretary to reject FES’s request and permit FERC, working with PJM and other RTOs and ISOs, as well as the North American Electric Reliability Corporation, to continue their efforts to address any potential reliability and resilience issues.¹⁵

Alternative Approach

If, notwithstanding this and other submissions, you continue to have resilience or reliability concerns, we urge you to take a transparent and deliberate approach rather than rushing to judgment at high risk of making a decision that could haunt markets and, consequently, consumers and the industry, for many years to come. As explained above, notwithstanding the efforts of FES and coal interests to create a perception of urgency, there is no immediate threat. In particular, PJM has stated that, even those FES units that have announced their retirement will generally remain operational until at least May 2021.¹⁶ And on April 30, 2018, PJM issued a notification definitively concluding that the retirement of FES’s generating units “is not expected to adversely

¹⁰ FES Request at 1.

¹¹ See *Grid Reliability & Resilience Pricing*, 162 FERC ¶ 61,012 at P 15 (2018) (“*Grid Reliability*”), *reh’g pending*.

¹² See Letter from Vincent P. Duane of PJM Interconnection, L.L.C. to the Honorable James Richard Perry re: FirstEnergy Solutions’ Request for Emergency Relief under Section 202 of the Federal Power Act (Mar. 30, 2018), <http://www.pjm.com/-/media/documents/other-fed-state/20180330-response-to-fe-solutions-request-for-emergency-relief.ashx> (“PJM March 30 Letter”).

¹³ See PJM Interconnection, L.L.C., *Perspective and Response of PJM Interconnection to National Energy Technology Laboratories Report Issued March 13, 2018*, <http://www.pjm.com/-/media/library/reports-notices/weather-related/20180413-pjm-response-to-netl-report.ashx?la=en>.

¹⁴ See, e.g., DOE Report at 7, 23 (indicating that coal facilities that recently retired had an average age of 54 years, while the expected life of such facilities is 40 years); *id.* at 25, 32 (many of the nuclear facilities that have retired are single-unit plants that have high costs).

¹⁵ See generally *Grid Reliability*, 162 FERC ¶ 61,012 (initiating proceedings).

¹⁶ See PJM March 30 Letter.

affect the reliability of the PJM Transmission System due to a combination of remedial measures.
...¹⁷

There is more than adequate time for further study and deliberation on this issue. Indeed, as a result of your prior notice of proposed rulemaking, FERC has already directed PJM, as well as the other RTOs and ISOs, to identify and address any resilience concerns. Moreover, PJM also announced on April 30, 2018, that it is commencing an effort “to analyze fuel security vulnerabilities and establish criteria to assess areas in the PJM system that could face future fuel security issues,” and to implement market solutions to allow eligible resources to compete to meet those criteria.¹⁸ Consequently, there is no urgency, and a rush to judgment will undermine PJM’s current work, thereby doing great harm without advancing the cause of national security beyond what the markets already provide.

In the event that you nevertheless believe some action is warranted at this time, any relief should be tailored to minimize adverse impacts on the competitive markets. In particular, to the extent that you decide it is necessary to grant FES’s request for cost-based compensation, such compensation should be on an interim basis only and should further be contingent on the subsidized facilities operating on a standby basis, and not participating in the PJM energy or capacity markets unless and until FERC declares that there is an emergency. These limitations will not correct the inefficiencies resulting from the requested subsidies, but will at least help protect the viability of PJM’s competitive markets.


¹⁷ Letter from Steven R. Pincus of PJM Interconnection, L.L.C. to the Honorable James Richard Perry re: FirstEnergy Solutions’ Request for Emergency Relief under Section 202 of the Federal Power Act (Apr. 30, 2018), at 4, <http://www.pjm.com/-/media/documents/other-fed-state/20180430-motion-to-intervene.ashx>.

¹⁸ See PJM Interconnection, L.L.C., *PJM Announces Next Phase of Grid Resilience Initiative – Grid operator to examine fuel security risks* (Apr. 30, 2018), http://www.pjm.com/-/media/about-pjm/newsroom/2018-releases/20180430-news-release-fuel-security-initiative_.ashx.

Conclusion

We are convinced that there is no authority or basis under Section 202(c) of the FPA, the DPA, or FAST Act that justifies action to subsidize or otherwise assist uneconomic power plants. There is no industry or national security emergency. PJM has made clear there is no reliability concern that needs to be addressed now. There is no evidence that the supply chain for natural gas suffers from systemic vulnerability. PJM is reviewing resiliency and fuel security issues. In short, there simply is no need for DOE to take action at this time. Against this backdrop, the requested action would be antithetical to the principles of free markets, for no legitimate reason. It would harm consumers, generators (other than coal or nuclear generators), and the natural gas industry. We therefore urge you to reject or ignore FES's self-motivated plea for you to grant its application, and not to take any other action that would have government picking winners and losers.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Thad Hill", is positioned above the printed name.

Thad Hill
President & Chief Executive Officer

cc: The Honorable Kevin J. McIntyre, Chairman, FERC
The Honorable Neil Chatterjee, Commissioner, FERC
The Honorable Richard Glick, Commissioner, FERC
The Honorable Cheryl A. LaFleur, Commissioner, FERC
The Honorable Robert F. Powelson, Commissioner, FERC

From: Malloy, Brian
To: AskOE
Subject: First Energy 202(c) Application
Date: Tuesday, May 01, 2018 2:54:44 PM
Attachments: [October 2017 IBEW 4th District.pdf](#)
[May 2017 IBEW 4th District.pdf](#)

Document 138

Dear Secretary Perry:

The International Brotherhood of Electrical Workers (IBEW), Fourth District, represents roughly 50,000 workers employed in a variety of industries across Ohio, Kentucky, West Virginia, Virginia, Maryland, and the District of Columbia. I am writing to encourage you to issue a Section 202(c) emergency order as requested by FirstEnergy Solutions Corporation (FirstEnergy) in its March 29, 2018 application.

The IBEW Fourth District supports all generation sources and believes that grid reliability can be achieved by acknowledging and supporting the unique traits of each generation source. The IBEW supported the Department of Energy's (DOE) study of grid reliability and resiliency and was pleased with the DOE's findings. In the aftermath of that study, I wrote in support of the DOE's Grid Resiliency Pricing Rule. As detailed in FirstEnergy's application for a Section 202(c) emergency order, the Federal Energy Regulatory Commission (FERC) has indicated somewhere between 22,000 and 30,000 megawatts of capacity in PJM alone are at risk of closure. This is in addition to recent and announced baseload retirements. Notwithstanding, FERC rejected the Grid Resiliency Pricing Rule. FERC's rejection of the proposed rule combined with the loss of baseload power make it necessary for you to exercise your Section 202(c) authority in a timely manner.

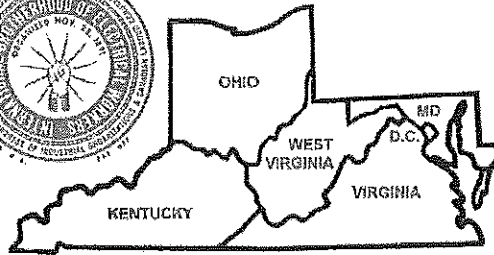
In the IBEW's Fourth District there are thousands of members and consumers who will be impacted by your decision on FirstEnergy's application. I respectfully urge you to grant its request and ensure that the market and grid are prepared for increased energy consumption over the coming months.

Sincerely,

BRIAN G. MALLOY
INTERNATIONAL VICE PRESIDENT
I.B.E.W. FOURTH DISTRICT
5100 BUCKEYSTOWN PIKE, SUITE 255
FREDERICK, MD 21704
o: 301-378-7014 c(b) (6)
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**INTERNATIONAL
BROTHERHOOD OF
ELECTRICAL WORKERS
FOURTH DISTRICT**



LONNIE R. STEPHENSON
International President

KENNETH W. COOPER
International Secretary-Treasurer

BRIAN G. MALLOY
*International Vice President
Fourth District*

5100 Buckeystown Pike, Suite 255 • Frederick, MD 21704 • (301) 378-7014 • Fax (301) 378-7024 • IVPD_04@ibew.org

May 22, 2017

Mr. Rick Perry
United State Secretary of Energy
1000 Independence Avenue, S.W.
Washington, DC 20585

Dear Secretary Perry:

The International Brotherhood of Electrical Workers, Fourth District, represents roughly 50,000 workers employed in a variety of industries across Ohio, Kentucky, West Virginia, Virginia, Maryland, and the District of Columbia. From utilities to rail, many IBEW represented industries have direct experience with baseload power and the electric grid. Safety, efficiency, reliability of generation and the grid are of utmost importance to the IBEW. I appreciate your April memorandum calling for a study that will examine issues regarding the long-term reliability and resiliency of the grid.

I want to take this opportunity to stress the importance of International President Stephenson's comments in his May 16, 2017 letter to you. The IBEW Fourth District supports all generation sources and believes grid reliability and resiliency can be achieved by acknowledging and supporting the unique traits of each generation source. As President Stephenson stated, it is critical to recognize the importance of plants that can operate efficiently 24 hours a day and have on-site fuel supplies.

Grid reliability and resiliency also depend on a skilled workforce that is ready to operate and maintain baseload power plants. In the Fourth District alone, there are thousands of members who are either directly or indirectly regularly employed, ensuring these plants are operating safely and efficiently. These are good jobs that allow IBEW members to support their local economies.

With energy consumption projected to increase steadily over the next two decades, it is important that the market and grid are prepared. I look forward to working with you and providing additional district-specific information as needed.

Sincerely,

Brian G. Malloy
International Vice President
IBEW Fourth District

BGM/lcm
Enclosure



**INTERNATIONAL
BROTHERHOOD OF
ELECTRICAL WORKERS
FOURTH DISTRICT**

4-552781-8



LONNIE R. STEPHENSON
International President

KENNETH W. COOPER
International Secretary-Treasurer

BRIAN G. MALLOY
*International Vice President
Fourth District*

5100 Buckeystown Pike, Suite 255 • Frederick, MD 21704 • (301) 378-7014 • Fax (301) 378-7024 • IVPD_04@ibew.org

October 23, 2017

Federal Energy Regulatory Commission
Office of the Secretary
888 First Street, NE
Washington, DC 20426

Re: Proposed Grid Resiliency Pricing Rule, RM 18-1-000

Dear Secretary Bose:

The International Brotherhood of Electrical Workers (IBEW), Fourth District, represents roughly 50,000 workers employed in a variety of industries across Ohio, Kentucky, West Virginia, Virginia, Maryland, and the District of Columbia. Many IBEW-represented industries have direct experience with baseload power generation and the electric grid. On behalf of the workers in the Fourth District, I write in support of the Department of Energy's (DOE) "Grid Resiliency Pricing Rule."

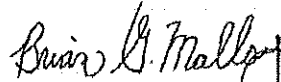
In May of this year, I wrote to the DOE in support of their study of reliability and resilience of the electric grid. In late August, the findings of that study were published, echoing many of the concerns the IBEW has been voicing for years. As discussed in the attached letter from IBEW International President Stephenson, baseload coal and nuclear power plants can operate efficiently 24 hours a day and are unique in that they have on-site fuel sources. These plants are described by the DOE in the proposed rule as "fuel secure" and because of this attribute, coal and nuclear fueled generation are essential for long-term grid reliability and resiliency.

While the IBEW supports all generation sources, the Grid Resiliency Pricing Rule is necessary to ensure coal and nuclear generation are adequately compensated. Despite the aggressive timeline, the proposed changes can be accomplished without disruption of the current market structure. I respectfully

urge the Federal Energy Regulatory Commission to adopt this proposed rule to ensure a balanced, diverse energy mix that can meet future consumer demand.

I look forward to working with you and providing district-specific information as needed.

Sincerely yours,

A handwritten signature in black ink, appearing to read "Brian G. Malloy". The signature is fluid and cursive, with a large loop at the end of the last name.

Brian G. Malloy
International Vice President
IBEW Fourth District

Enclosure



**INTERNATIONAL
BROTHERHOOD
OF ELECTRICAL
WORKERS®**

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LONNIE R. STEPHENSON
International President

KENNETH W. COOPER
International
Secretary-Treasurer

May 16, 2017

Mr. Rick Perry
United States Secretary of Energy
1000 Independence Ave., S.W.
Washington, DC 20585

Dear Secretary Perry:

On behalf of the 750,000 active members and retirees of the International Brotherhood of Electrical Workers (IBEW), I write in support of your directive to "initiate a study to explore critical issues central to protecting the long-term reliability of the electric grid" The IBEW represents individuals employed in a variety of fields related to the grid including utilities, construction, manufacturing, and rail. Our practical knowledge of the reliability of the grid makes the IBEW uniquely suited to comment and provide input on the importance of baseload power plants.

In January, the U.S. Energy Information Administration issued its Annual Energy Outlook for 2017.¹ Energy consumption is set to increase 5-11% between 2016 and 2040.² This projection underscores the necessity of our nation's coal and nuclear baseload power plants. Unfortunately, in many areas baseload plants are closing, sometimes prematurely, because of economic challenges. These challenges are partially because of numerous Environmental Protection Agency regulations that the IBEW has provided comment on in addition to subsidies and low natural gas prices.

Baseload power plants need to be appropriately compensated for the megawatts of power they generate. Unlike other generation sources, baseload coal and nuclear power plants can operate efficiently 24 hours a day and provide frequency support services essential to reliability. In addition, on-site fuel supplies make these plants the most reliable because of their ability to withstand severe weather, infrastructure issues, or other catastrophic, unexpected national security events.

For your consideration as a part of the study, I would like to submit the attached documents. In addition, I welcome the opportunity for IBEW experts to meet with your Department of Energy experts working on this important study and implementation plan to discuss our position in greater detail.

Sincerely yours,

Lonnie R. Stephenson
International President

LRS:mlm
Enclosures

¹ U.S. Energy Information Administration, Annual Energy Outlook 2017 with projections to 2050 (Jan. 2017), [http://www.eia.gov/outlooks/aeo/pdf/0383\(2017\).pdf](http://www.eia.gov/outlooks/aeo/pdf/0383(2017).pdf).

² *Id.* at 4.

From: Brad Stevens
To: AskOE
Subject: FirstEnergy Solutions Request for 202(c) Emergency Order
Date: Thursday, May 03, 2018 2:28:19 PM
Attachments: [IBEW Local 50.pdf](#)

On October 23, 2017 I filed comments with FERC outlining Local Union 50 support for the proposed Grid Reliability and Resiliency Pricing Rule (Docket No. RM18-1-000). I have attached a copy of my comments. The need for solid, reliable baseload generation assets cannot be overstated. We urge you to issue an emergency order as requested by FirstEnergy Solutions under section 202(c) of the Federal Power Act.

Brad Stevens
President - Business Manager
Local Union 50, International Brotherhood of Electrical Workers

Local 50 Web Site

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October 23, 2017

**UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION**

**Grid Reliability and
Resiliency Pricing**

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Docket No. RM18-1-000

**COMMENTS OF THE INTERNATIONAL BROTHERHOOD OF ELECTRICAL
WORKERS, LOCAL UNION 50 IN SUPPORT OF THE PROPOSED RESILIENCY
RULE**

In accordance with the Federal Energy Regulatory Commission's ("FERC" or the "Commission") October 2, 2017 notice and the Commission Staff's October 4, 2017 notice, Local 50 of the International Brotherhood of Electrical Workers (Local 50) respectfully provides our initial comments on the Secretary of Energy's ("Secretary") September 28, 2017 proposed rulemaking (the "Proposed Rule").

On September 28, 2017, the Department of Energy ("DOE") issued the "Grid Resiliency Pricing Rule" (the "Proposal") directing the Federal Energy Regulatory Commission ("FERC") to adopt a rule requiring operators of organized markets to "ensure that certain reliability and resiliency attributes of electric generation sources are fully valued." Such a rule, as contemplated by the regulatory language of the Proposal, will ensure that existing nuclear and coal-fired electric generating stations will be compensated appropriately and fully for their costs of operation and will avoid premature retirement. Adoption of that rule will thus sustain the long-term viability of critical power plants, preserve and create jobs, maintain electric reliability, and provide substantial economic benefits to the many hard-working Americans living throughout the nation.

We have grown increasingly concerned in recent years that well-intended public policy initiatives at both the federal and state level have lost sight of the first principle of the electric utility business: maintaining reliability at all times. This vital work of providing reliability at all times has provided well-paying, honorable work for our members for many

decades. That is why we have been distressed to see the retirement of well running electric generation facilities, primarily coal, in regulated states and nationwide. We are also mindful of the ongoing threats facing the nuclear industry in nominally deregulated states (we refer to such states as nominally deregulated in view of the numerous public policy interventions to favor particular resources). The result of premature retirement of power plants has been loss of opportunity for hard working men and women in addition to reliability threats.

IBEW Local 50 strongly supports the Proposal and shares the Secretary's urgency that FERC act promptly to direct operators of organized markets to issue the requested rule. FERC has the ability to act, and must act, without undue delay to avoid premature closure of crucial power plants and our members' loss of critical economic and reliability benefits. FERC has thoroughly examined how electric markets function and how those markets affect the continued operation of crucial power plants needed for reliability for some time. FERC has the requisite basis to act now.

We were pleased that the Secretary's proposed rule has started an important conversation around pricing for resilience and reliability. We believe that inherent in such discussion is a greater focus on maintaining the fuel diversity that has benefitted our members, the nation's economy, and national security. We note that while this issue was often discussed, it was nowhere near the top of the energy policy agenda until the Secretary's proposed rule was issued. We are grateful to the Secretary for highlighting the importance of this issue and for moving it to the top of the agenda.

I. COMMUNICATIONS

All communications, correspondence, and documents related to this proceeding should be directed to the following person:

Brad Stevens
President & Business Mgr.
IBEW Local 50
1400 E. Nine Mile Road, Suite 50
Highland Springs, VA 23075
804-328-2972
brad.stevens@ibew50.org

II. DESCRIPTION OF IBEW LOCAL 50

IBEW Local 50 is a progressive labor organization that represents more than 3,000 individuals employed by Dominion Energy, Southern Company, First Energy, and Craig-Botetourt Electric Cooperative. These men and women keep our electrical grid operating 24 hours a day, seven days a week. Our members work in electric generation facilities of all types, as well as in transmission and distribution of electricity to some of our nation's most essential facilities, including the world's largest naval base, the Pentagon, and numerous other military, intelligence, and homeland security installations. Accordingly, we are mindful of the need to deliver around-the-clock electricity 365 days a year to keep our nation safe and secure, our economy functioning, and our homes heated, cooled, and lit.

III. DESCRIPTION OF IBEW LOCAL 50'S INTEREST IN PROCEEDING

IBEW Local 50 is party to collective bargaining agreements with owners whose portfolios include baseload coal and nuclear power plants located in Alabama, Georgia, North Carolina, Ohio, Pennsylvania, Virginia, and West Virginia. As a result, the wages, terms and conditions of employment of its members may be directly as well as indirectly affected by the actions taken by the FERC and operators of organized markets in this proceeding. Thus, IBEW Local 50 members have a direct and substantial interest in this proceeding. As well, the unique perspective of IBEW Local 50 and its members will only serve to enhance the record in this proceeding.

IV. COMMENTS

The communities where struggling baseload coal and nuclear power plants are located are dependent on the jobs and economic development opportunities the power plants provide. The reductions in operations and capital improvement expenditures at numerous power production and manufacturing facilities across the country has led to extreme hardship for the thousands of union workers employed in this industry as well as their families.

It is imperative that baseload coal and nuclear plants continue to operate in light of these dire circumstances. Baseload coal and nuclear plants provide good paying union jobs and economic opportunities to IBEW Local union members. In addition to direct labor in the generation sector, the maintenance and capital improvement work at the plants supports the local economies by creating thousands of good paying union jobs for contractors. These plants also contribute significant and vital state and local tax revenues that support local schools, police and fire departments and other vital public services. The loss of jobs, tax revenue, and the ripple effect of such losses throughout local economies, will have a severely detrimental impact on the country.

The issuance of a rule preserving the continued operation of resilient baseload coal and nuclear power plants will maintain a reliable supply of electricity for the region's energy-intensive economy in two ways. First, the preservation of certain plants will avoid the need to replace lost generation with imports and the associated construction of infrastructure to facilitate such importation. Preserving baseload coal and nuclear power plants will keep these needed, reliable facilities running close to home without the need to depend on distant resources, particularly during catastrophic events like severe storms, to fulfill our dynamic need for reliable electricity.

Second, premature plant closures will deplete the pool of highly skilled (and specifically trained and experienced) employees. With a depletion of this skilled and experienced group of workers, and the possible replacement of these workers with more distant and perhaps less-skilled individuals, we will see a direct and adverse impact on our ability to maintain the generation facilities that continue to operate and our ability to respond promptly to severe contingencies affecting the operation of these remaining plants in operation. In short, allowing baseload coal and nuclear power plants to close prematurely will have an adverse impact on the reliability of the nation's electricity supply and on the reliable operation of regional electricity systems.

Rates for the sale of electricity that are inadequate to sustain the operation of base load generation facilities that provide reliability and resiliency support cannot be considered to be just and reasonable. Because of the loss of jobs, the significant reduction in payments

to local governments, and the decline in electricity resource and grid reliability that would result from deactivation of nuclear and coal-fired generating facilities it is essential that FERC adopt a rule, such as that proposed by DOE, which will ensure that such generating facilities are fully compensated for their costs and will remain in operation.

In order to mitigate the risk that such generating units may be deactivated prematurely, IBEW Local 50 strongly urges FERC to adopt the rule proposed by the DOE as promptly and comprehensively as possible. We believe that FERC has a sufficient record to act that will be further bolstered by the comments considered in this proceeding. FERC has thoroughly considered the impact of electric markets on the sustained operation of at-risk power plants and, as noted by the Secretary of the DOE, the time to act is now given the severe impacts to system reliability and resilience, and national security, attendant to the premature closure of crucial power plants. Any protracted delay in creating fully compensatory market rules will only exacerbate the problem of pre-mature closures.

In acting promptly, we believe FERC should also direct the organized market operators to issue a rule that is not only compensatory (and based on the regulatory language of the Proposal) but comprehensive and enduring. The rules to be issued by operators of organized markets should be fair and transparent, and should ensure that critical power plants can continue to operate for the long-term and without the prospect of repeated re-examination and adjustment to their market compensation. The uncertainty that less than comprehensive and enduring market rules will engender will defeat the very purpose of preserving the extended operation of these much-needed power plants.

We were pleased that the Secretary's proposed rule has started an important conversation around pricing for resilience and reliability. We believe that inherent in such discussion is a greater focus on maintaining the fuel diversity that has benefitted our members, the nation's economy, and national security. We note that while this issue was often discussed, it was nowhere near the top of the energy policy agenda until the Secretary's proposed rule was issued. We are grateful to the Secretary for highlighting the importance of this issue and for moving it to the top of the agenda.

We urge the Commission to act with the utmost dispatch to work with the Secretary and other policy makers to preserve the around-the-clock resources that power our nation and employ our members. We view the Secretary's action and the Commission's deliberations as bolstering rather than competing with state specific action (such as Virginia's recent decision to encourage life extensions of existing nuclear units). On behalf of our members we stress the need for prompt action, we emphasize the importance of this issue for the day-to-day functioning of our 21st century society, and we encourage the Commission to keep its focus on the big picture needed to address this issue rather than on the vested interests of any particular stakeholder who may argue for delay or inaction.

There is a price to doing nothing. That price is less security for our nation, less prosperity for our economy, and fewer opportunities to the men and women who keep our society running each and every day. For these reasons we urge prompt action.

Thank you for considering our comments.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "B Stevens", with a stylized flourish at the end.

Brad Stevens
President & Business Manager
IBEW Local 50

From: Slater, Andrew C. (DOS)
To: AskOE
Subject: Opposition to FirstEnergy Solutions Corp.'s Request for Emergency Action
Date: Thursday, May 03, 2018 12:25:48 PM
Attachments: [image005.png](#)
[image006.png](#)
[DPA FES letter.pdf](#)

Mr. Secretary,

As the Public Advocate for the state of Delaware, I want to voice our opposition to FirstEnergy Solutions Corp.'s request for Emergency Action at the Department of Energy. Attached, please find our letter to Mr. Francis Brooke at the White House stating such opposition.

Thank you for your service. We look forward to working with you.

Sincerely,

Drew Slater

Public Advocate

29 S. State Street

Dover, DE 19901

Office: 302-241-2550

Toll Free: 1-888-607-2427

Cell: (b) (6)

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Andrew.Slater@state.de.us

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STATE OF DELAWARE
DEPARTMENT OF STATE
DIVISION OF THE PUBLIC ADVOCATE



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(302) 577-5077

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DOVER, DELAWARE 19901
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May 3, 2018

Mr. Francis Brooke
Special Assistant to the President, Domestic Energy and Environmental Policy
The White House
1600 Pennsylvania Avenue NW
Washington, DC 20500

RE: FirstEnergy Solution's Request for Emergency Order

Dear Mr. Brooke:

I am the duly-appointed Public Advocate for the state of Delaware. The Delaware legislature has tasked me with representing the interests of Delaware's ratepayers in federal and state proceedings involving rates and energy policy.

On March 29, 2018, FirstEnergy Solutions Corp ("FES") submitted a Request for Emergency Order Pursuant to Federal Power Act Section 202(c) ("Request" or "Emergency Order Request") to the Secretary of the Department of Energy ("DOE"). I do not believe that FES has presented circumstances that constitute an emergency under Section 202(c) of the Federal Power Act. Further, FES' request attempts to circumvent the legitimate deliberative processes already underway at PJM for its own narrow ends, without any evidence of a legitimate crisis in the capacity market or grid reliability. Therefore, on behalf of the Delaware ratepayers whom I represent, the Delaware Division of the Public Advocate ("DPA") opposes FES' request.

FES' request is overly broad and fails to demonstrate that an emergency exists within the PJM footprint if its coal and nuclear plants are not bailed out. During the December 28, 2017 to January 7, 2018 weather event, the so-called "bomb cyclone," "PJM experienced one of our top 10 winter peak demand days of all time . . . Overall, the grid and the generation fleet performed well. Even during peak demand, PJM had excess reserves and capacity."¹

In addition, "PJM has seen significant new entry (nearly 40,000 MW) of a diverse mix of fuel types since the inception of the capacity market. PJM has experienced over 20,000 MW of coal retirements in the same period, and the average age of the coal units that have retired was over 50 years. In short, the markets have helped to incent new efficient generation of all fuel types and helped to retain existing generation needed to serve electric needs of customers in the PJM footprint."²

¹ PJM Coal Snap Performance. February 26, 2018. <http://www.pjm.com/-/media/library/reports-notice/weather-related/20180226-january-2018-cold-weather-event-report.ashx>. And, as indicated in the January 23, 2018 testimony of PJM CEO Andrew Ott before the U.S. Senate and Natural Resources Committee.

² PJM Coal Snap Performance. February 26, 2018. <http://www.pjm.com/-/media/library/reports-notice/weather-related/20180226-january-2018-cold-weather-event-report.ashx>.

As with any competitive market, price is a key determinant. In this regard, some coal and nuclear plants have become uneconomic. This is the case with FES, as further evidenced by its bankruptcy filing on March 31, 2018.³

If this request is granted, consumers throughout the PJM region will pay higher prices with little if any demonstrated benefit to grid reliability. Meanwhile, there are two pending dockets before the Federal Energy Regulatory Commission ("FERC") regarding grid resilience and the capacity market construct.⁴ These ongoing dockets will examine the issues raised by FES in a systematic and deliberate way, allowing all interested parties to voice their opinions.

Additionally, consistent with the PJM Tariff, PJM conducted a thorough analysis of its system to determine whether the announced retirements would present reliability issues.⁵ On April 30, 2018, PJM completed this analysis and informed FirstEnergy, "that the deactivation of these generating units is not expected to adversely affect the reliability . . . with these measures, the PJM Transmission system will remain reliable, and therefore the generating units listed above may plan to deactivate as scheduled."⁶

Again, "PJM can state without reservation there is no immediate threat to system reliability. Indeed, the FES units that announced their expected retirement earlier this week, by their own disclosures, will remain operational in most cases until through May 2021 . . . But even assuming these units do in fact close as of the dates announced, PJM, FERC, and the Department of Energy will have ample time before then to take measures, which at the extreme might include the kind of relief sought in the instant request."⁷

Given that PJM has stated the system remains reliable, and absent an emergency need (which has not been demonstrated) to subsidize uneconomic coal and nuclear plants, FES' request for an emergency order should be denied.

Thank you for your consideration of these comments on behalf of the citizens of Delaware.

Sincerely,

/s/ Andrew Slater

Andrew C. Slater
Public Advocate

³ http://www.cleveland.com/business/index.ssf/2018/03/firstenergy_solutions_bankrupt.html

⁴ *Grid Resilience in Regional Transmission Organizations and Independent System Operators*, Docket No. AD18-7-000 (January 8, 2018, and PJM Interconnection submits tariff filing per 35.13(a)(2)(iii): Revisions to Address Impacts of State Public Policies on the PJM Capacity Market, ER18-1314-000 (4/9/2018).

⁵ PJM letter to Energy Secretary Perry regarding FirstEnergy Solutions' Request for Emergency Relief under Section 202 of the Federal Power Act. March 30, 2018.

⁶ PJM Letter to Secretary of Energy. April 30, 2018.

⁷ PJM letter to Energy Secretary Perry regarding FirstEnergy Solutions' Request for Emergency Relief under Section 202 of the Federal Power Act. March 30, 2018.

From: Mersol-Barg, Amy E.
To: [AskOE](#)
Cc: [Walker, Bruce](#); [Hoffman, Patricia](#); [Scherman, William S.](#); [Jakubiak, Jeffrey M.](#); [Smith, Christopher](#)
Subject: FirstEnergy Solutions Letter re 202(c) Application
Date: Friday, May 04, 2018 3:26:58 PM
Attachments: [2018.05.04 FES Response to PJM Letter.pdf](#)

Secretary Perry:

Please find attached a letter from FirstEnergy Solutions Corp. ("FES") responding to a letter that PJM filed on April 30, 2018 concerning FES' Section 202(c) application.

Sincerely,

Amy Mersol-Barg

Amy E. Mersol-Barg

GIBSON DUNN

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This message may contain confidential and privileged information. If it has been sent to you in error, please reply to advise the sender of the error and then immediately delete this message.

May 4, 2018

VIA EMAIL

The Honorable James Richard Perry
Secretary of Energy
United States Department of Energy
1000 Independence Avenue, S.W.
Washington, DC 20585

Re: Request for Emergency Order Pursuant to Federal Power Act Section 202(c)

Dear Secretary Perry:

FirstEnergy Solutions Corp. ("FES"), on behalf of its affiliates named in its March 29, 2018 Section 202(c) application (the "Application"), respectfully responds herein to the April 30, 2018 letter to you from PJM Interconnection, L.L.C. ("PJM") regarding PJM's Fuel Security Initiative.

PJM's views on resilience are best summed up by the classic image of Lucy holding a football for Charlie Brown to kick, only to pull it away at the last moment, resulting in Charlie Brown once again flying through the air and landing flat on his back. Indeed, PJM's latest procedural gambit confirms what FES has been warning DOE (and FERC) about all along: at a time when resilient generation is closing permanently, PJM continues to refuse to act, like Lucy continuing to pull away the football. PJM now suggests that it will take action sometime next year "*if*" PJM thinks it is necessary. Once again, PJM is asking DOE (and the Nation) to "rely on a narrow process run by an entity that has admitted that it does not have a clear view of what resilience is, how to measure it, or how to ensure it."¹ PJM's latest letter demonstrates that what was true then remains true now: PJM is either unwilling or unable to address effectively the emergency facing the Nation's electric grid. But unlike Charlie Brown, DOE does not need to keep blindly "trusting" Lucy since it *can kick the ball now* and address the resilience crisis by granting FES' Application.

Faced with a growing consensus that something must be done now to address the resilience crisis, and unlike its prior statements to FERC and others eschewing that any real problem exists, PJM now pivots and *belatedly* "recognizes that fuel security raises questions about electric system resilience which go beyond reliability" and that it must "[i]dentify system vulnerabilities and determine attributes . . . that ensure that peak demands can be met during extreme scenarios."² This sudden revelation rings hollow as it stands in stark contrast to PJM's

¹ Letter from FirstEnergy Solutions to Rick Perry, U.S. Sec'y of Energy at 1 (Mar. 30, 2018).

² Letter from Steven R. Pincus, Assoc. Gen. Counsel, PJM Interconnection, L.L.C., and Craig Glazer, Vice President, Fed. Gov't Policy, PJM Interconnection, L.L.C., to Rick Perry, U.S. Sec'y of Energy at 1-2 (Apr. 30, 2018) ("April 30 Letter").

recent and consistent refusal to acknowledge the problem let alone to act to address resilience issues.³

For example, just two months ago PJM told FERC that: 1) it needed authority to plan for resilience;⁴ 2) it lacked formal resilience criteria;⁵ 3) its existing markets were not designed with resilience in mind;⁶ 4) it required FERC to verify that it correctly identified system threats;⁷ and 5) it lacked requisite information, including real-time conditions on pipelines that support natural-gas fired power plants.⁸ But now PJM asserts all of a sudden that sometime next year it may be capable of identifying resilience attributes and designing a market mechanism to compensate generators for the resiliency benefits they provide “if” action is warranted.

PJM has made a similar about-face with respect to the need for nuclear and coal-fired generation in the electric grid. Following the cold weather in the Eastern United States last winter, Andy Ott, President and CEO of PJM, conceded that “[PJM] couldn’t survive without gas; [PJM] couldn’t survive without coal; [PJM] couldn’t survive without nuclear. [PJM] need[s] them all in the moment.”⁹ Since then, PJM has concluded that its grid “will remain reliable” despite the retirement of three FirstEnergy nuclear plants,¹⁰ representing a combined capacity of approximately 4,000 MW,¹¹ again ignoring concerns related to *resilience*. Further, Mr. Ott recently claimed that “[w]e do not feel we have a vulnerability today, *but will take a look at the system to see if we could have fuel security issues in the future.*”¹²

³ See, e.g., PJM INTERCONNECTION, PJM’S EVOLVING RESOURCE MIX AND SYSTEM RELIABILITY 5-6 (Mar. 30, 2017) (“‘Heavy’ reliance on one resource type, such as a resource portfolio composed of 86 percent natural gas-fired resources, however, raises questions about electric system resilience, which are beyond the reliability questions this paper sought to address.”), <http://www.pjm.com/~media/library/reports-notices/special-reports/20170330-pjms-evolving-resource-mix-and-system-reliability.ashx>; *Ott Addresses Resilience Importance at Grid 20/20*, PJM INSIDE LINES (Sept. 19, 2017) (quoting Andrew Ott, President and CEO, PJM Interconnection, L.L.C.) (“[Resilience] activities will happen as a part of the discussion. If we don’t do something, it will be done for us.”), <http://insidelines.pjm.com/ott-addresses-resilience-importance-at-grid-2020/>.

⁴ Comments and Responses of PJM Interconnection, L.L.C. at 5-6, *Grid Resilience in Regional Transmission Organizations and Independent System Operators*, FERC Docket No. AD18-7-000 (Mar. 9, 2018).

⁵ *Id.* at 37.

⁶ *Id.* at 66.

⁷ *Id.* at 5.

⁸ *Id.* at 6-8.

⁹ Press Release, Sen. Lisa Murkowski, Hearing Spotlights Importance of Energy Infrastructure, Diverse Fuel Mix (Jan. 23, 2018) (quoting Andrew Ott), <https://www.murkowski.senate.gov/press/release/hearing-spotlights-importance-of-energy-infrastructure-diverse-fuel-mix>.

¹⁰ April 30 Letter at 3-4.

¹¹ *Generation Deactivations*, PJM, <http://www.pjm.com/planning/services-requests/gen-deactivations.aspx> (last visited May 4, 2018).

¹² *PJM Will Test U.S. Mid Atlantic/Midwest Power Grid for Resiliency*, REUTERS (Apr. 30, 2018) (emphasis added), <https://www.reuters.com/article/pjm-power-resiliency/pjm-will-test-us-mid-atlantic-midwest-power-grid-for-resiliency-idUSL1N1S70XK>.

PJM's ever-shifting and inconsistent statements and positions underscore that action is needed, but PJM will not be the one to take it, at least in any meaningful time frame. PJM's latest announcement is nothing more than a delaying tactic. As PJM knows full well, the design and implementation of a "market-based approach" would take years even under the best circumstances. The grid and the Country do not have years. And as the failure of its capacity performance regime shows, PJM has a dismal track record of adopting effective "market based" approaches to these sorts of issues.

The Nation's wholesale electric markets have failed to recognize and properly value the benefits provided by nuclear and coal-fired generators for years, and, as a result, these generators face the imminent choice of whether to retire. PJM's consistent contradictions demonstrate that it lacks a firm grasp on the resilience problems facing the grid today, let alone how to address them, "if" it ever does.

The Department of Energy recently stated that FERC "has not taken sufficient action" despite "studying the underlying economic and regulatory causes of this problem for years" and so "urge[s] FERC to take *immediate* action to stop the loss of fuel-secure capacity."¹³ But the Department of Energy need not and indeed should not wait on FERC. Rather, urgent action by the Department of Energy is the only way to preserve nuclear and coal-fired generation while a long-term solution is developed by DOE and FERC.

Respectfully submitted,

/s/ Rick C. Giannantonio

William S. Scherman
Jeffrey M. Jakubiak
Jennifer C. Mansh
Gibson, Dunn & Crutcher LLP

Rick C. Giannantonio
General Counsel
FirstEnergy Solutions Corp.

Counsel for Applicants

cc: Bruce J. Walker, Assistant Secretary, DOE OEDER
Patricia A. Hoffman, Principal Deputy Assistant Secretary, OEDER

¹³ Gavin Bade, *PJM Launches Fuel Security Initiative to Counter Gas Reliance*, UTILITY DIVE (May 1, 2018) (quoting Shaylyn Hines, Spokesperson, Dep't of Energy) (emphasis added), <https://www.utilitydive.com/news/pjm-launches-fuel-security-initiative-to-counter-gas-reliance/522531/>.

From: Jeff Dennis
To: [AskOE](#)
Subject: Legal Analysis/Comments of AEE, API, AWEA, EPSA, INGAA, and NGSA
Date: Monday, May 07, 2018 5:40:34 PM
Attachments: [ATT00001.htm](#)
[Trade Associations Letter and Legal Analysis 5-7-18.pdf](#)

Attached, please find a legal analysis prepared jointly by Advanced Energy Economy (AEE), the American Petroleum Institute (API), the American Wind Energy Association (AWEA), the Electric Power Supply Association (EPSA), the Interstate Natural Gas Association of America (INGAA), and the Natural Gas Supply Association (NGSA) regarding FirstEnergy's application for an emergency order under Section 202(c) of the Federal Power Act.

The legal analysis addresses the unsuitability of Section 202(c), as well as the unsuitability of the emergency provisions of the Defense Production Act (DPA) and Section 215A of the Federal Power Act (added by the FAST Act of 2015), to the economic circumstances claimed by FirstEnergy in its application.

This group of associations, which represents a broad cross-section of the energy industry, respectfully urges Secretary Perry reject FirstEnergy's petition under Section 202(c) of the Federal Power Act, as well as any other related action under the Defense Production Act, Section 215A of the Federal Power Act or any other authority that provides unwarranted "emergency" relief.

Thank you,

Jeff

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EPSA



May 7, 2018

Via Electronic Mail

The Honorable James Richard Perry
Secretary of Energy
United States Department of Energy
1000 Independence Avenue, S.W.
Washington, DC 20585

Secretary Perry:

On behalf of Advanced Energy Economy, the American Petroleum Institute, the American Wind Energy Association, the Electric Power Supply Association, the Interstate Natural Gas Association of America, and the Natural Gas Supply Association, we write to oppose any action by the United States Department of Energy (DOE or the Department) that would use any of its emergency authorities as a means to provide economic support to a favored class of power plants. Power plant retirements are a normal, healthy feature of electricity markets. There is no emergency or threat to the national defense on which the Department could lawfully base the exercise of its emergency authorities.

I. Introduction

In October 2017, the Department used its authority under Section 403 of the Department of Energy Organization Act to propose a rule to be implemented by the Federal Energy Regulatory Commission (FERC or the Commission). DOE asserted that wholesale power markets do not adequately price the resiliency attributes of “fuel-secure” power plants. DOE defined fuel-secure power plants as those that maintain 90 days of fuel on site – a requirement that only coal and nuclear plants generally satisfy. DOE proposed that any such plants that are located within organized electric markets and that are not subject to cost-of-service rate regulation by any State or local authority (*i.e.* “merchant” plants) should receive full cost recovery along with a return on equity.

In January 2018, the Commission rejected DOE's proposal unanimously.¹ The Commission emphasized its historic commitment to both reliability and markets, observing that it "has been able to focus on both without compromising its commitment to either."² The Commission rejected the notion that the retirement of certain generators in regional transmission organization and independent system operator (RTO/ISO) markets meant that the prices in those markets were unjust and unreasonable.³ The Commission also concluded that DOE failed to establish that its own proposal was just and reasonable. The Commission observed that DOE's proposal would have extended cost recovery to all eligible units "regardless of need or cost to the system" and that the 90-day criterion would have unduly discriminated against other resources with resilience attributes.⁴

Although the Commission rejected DOE's proposal, terminating the proceeding, it did not ignore the issue DOE raised. FERC instead initiated a new proceeding dedicated to (1) developing a common understanding of resilience, (2) identifying how RTOs/ISOs assess threats to resilience, and (3) examining how RTOs/ISOs mitigate threats to resilience within a market context.⁵ In short, the Commission stayed true to its long-standing commitment to promote both markets and reliability "without compromising its commitment to either."

Though DOE's proposal was not adopted by FERC, there is no question that it was directed at the correct agency. DOE rightly identified FERC as the agency with which to raise concerns about the adequacy of wholesale electricity prices and Sections 205 and 206 of the Federal Power Act as the statutory provisions under which those concerns must be evaluated. In the months following FERC's rejection of the DOE NOPR, however, those urging above-market prices for coal and nuclear plants have moved on to other legal theories in the hopes of achieving the same result by other means.

On March 29, FirstEnergy Solutions and its affiliates (collectively, FirstEnergy) petitioned the Department to use its emergency authority under Section 202(c) of the Federal Power Act to issue an order that would give all merchant coal and nuclear plants in PJM a guaranteed return on equity for four years. On April 18, Senator Manchin wrote to President Trump urging him to invoke the Defense Production Act to support coal and nuclear plants. Senator Manchin followed that letter with a similar request to Secretaries Perry and Mattis on April 25. In the weeks that followed, others have suggested yet another authority, Section 215A of the Federal Power Act, which was enacted as part of the FAST Act of 2015.

These other authorities do not do what their proponents claim. All three rely on a finding that the retirement of certain coal and nuclear plants constitutes either an "emergency" or a threat to the national defense. No such finding can credibly be made. In addition, because these authorities are intended for emergency circumstances and threats to the national defense, they afford narrow

¹ *Order Terminating Rulemaking Proceeding, Initiating New Proceeding, and Establishing Additional Procedures*, 162 FERC ¶ 61,012 (Jan. 8, 2018).

² *Id.* at P 11.

³ *Id.* at P 15.

⁴ *Id.* at P 16.

⁵ See FERC Docket No. AD18-7.

relief to address those circumstances. They do not empower the Department to provide the long-term out-of-market price support that the coal and nuclear plant owners seek. That authority lies with the Commission, which reviews rate proposals pursuant to Sections 205 and 206 of the Federal Power Act to ensure that they are just and reasonable and not unduly discriminatory or preferential.

II. The Orderly Retirement of Inefficient Generators Does Not Pose an Emergency

The question of whether additional market reforms should be pursued to mitigate fuel supply risks should not be conflated with the question of whether an emergency exists today. The former question is receiving active attention through the appropriate channels. FERC, as noted above, has initiated a proceeding on how resilience can be promoted within RTO/ISO markets. PJM (along with the other RTOs/ISOs) is part of that proceeding and has initiated a number of processes to consider market structure improvements that address potential future resilience challenges in its markets.⁶ The intention of those processes, we hope, is to develop analytically sound measures of resilience and a technology-neutral market-based approach that mitigates resilience risks at the lowest cost to ratepayers. But, while FERC and the RTOs/ISOs are taking the concepts of resilience and fuel security seriously, none of them accept the idea that the orderly retirement of uneconomic power plants constitutes an emergency.

FirstEnergy's claim that an emergency exists rests entirely on the observation that some coal and nuclear plants —most importantly those owned by FirstEnergy — are losing money and are therefore likely to retire in the coming years. That is not an emergency. The retirements FirstEnergy complains about will unfold over a period of years and will be carefully planned. FirstEnergy's three nuclear plants would not deactivate until 2021, and very few of the merchant generators FirstEnergy lists in Attachment A to its application have indicated any intention to retire in the near-term. If PJM determines that the retirement of any of these units would compromise system reliability, it can offer those units cost of service compensation under a "Reliability Must Run" contract that would keep those plants online until the reliability issue is resolved. In this case, PJM has completed its 30-day analysis of the deactivation notice from FirstEnergy regarding the retirement of three units (in 2020 and 2021) and found "the deactivation of these generating units is not expected to adversely affect the reliability of the PJM Transmission System due to a combination of remedial measuresWith these measures, the PJM Transmission system will remain reliable, and therefore the generating units listed above may plan to deactivate as scheduled."⁷

The retirements FirstEnergy complains of come in the context of an oversupplied capacity market and flat or declining demand. PJM's most recent capacity auction yielded a 23.9% reserve margin, which well exceeds its target of 16.6%. Reserve margins have grown because new and diverse

⁶ See, e.g., PJM, *Valuing Fuel Security* (April 30, 2018); see also, ISO New England, *Operational Fuel-Security Analysis* (Jan. 17, 2018), https://www.iso-ne.com/static-assets/documents/2018/01/20180117_operational_fuel-security_analysis.pdf.

⁷ PJM, Letter re First Energy Solutions, Corp. Request for Emergency Order Pursuant to Federal Power Act Section 202(c) Submitted March 29, 2018, (April 30, 2018), <http://www.pjm.com/-/media/documents/other-fed-state/20180430-motion-to-intervene.ashx>

generation resources have come online faster than older units have retired,⁸ and because peak loads continue to decline.⁹ For these reasons, PJM has emphasized repeatedly that there is no emergency. PJM's spokesperson put it succinctly:

There is no immediate emergency. Diversity of the fuel supply is important, but the PJM system has adequate power supplies and healthy reserves in operation today, and resources are more diverse than they have ever been. Nothing we have seen to date indicates that an emergency would result from the generator retirements.¹⁰

The performance of the PJM electric grid during the 2018 Bomb Cyclone further demonstrates that no emergency exists. During the eleven-day period of extreme cold, the system performed well. PJM has explained that “[e]ven during peak demand, PJM had excess reserves and capacity.”¹¹ Moreover, from the perspective of system resilience, PJM showed improvement as measured against the 2014 Polar Vortex. Total forced outages were 40,200 MW during the 2014 Polar Vortex, but declined to 23,751 MW in the 2018 Bomb Cyclone. While higher temperatures explain some of this difference, PJM has explained that it is also attributable to “increased investment in existing resources, improved performance incentives, enhanced winterization measures and increased gas-electric coordination.”¹²

FirstEnergy attempts to flip the positive experience of the 2018 Bomb Cyclone on its head by pointing to a single, flawed study claiming that the region would have suffered “interconnect-wide blackouts” had certain coal plants been unavailable.¹³ The study based this alarmist claim on the observation that, during the cold weather, coal plants provided more incremental generation than did natural gas or nuclear plants. As PJM and others have noted, however, the study misunderstood why those coal plants were dispatched more frequently. PJM explained that, under its economic dispatch model, “PJM dispatched coal units because *their costs were lower* during certain hours of the cold snap. Natural gas and nuclear units were not unreliable or otherwise unavailable to

⁸ Across capacity auctions spanning the last ten years, PJM has added 50,792 MW of new generation capacity, 9,485 MW of demand resource capacity, and 2,062 MW of energy efficiency capacity, while retiring or derating 39,639 MW of existing generating capacity. PJM, *2020/2121 RPM Base Residual Auction Results*, <https://www.pjm.com/-/media/markets-ops/rpm/rpm-auction-info/2020-2021-base-residual-auction-report.ashx>.

⁹ PJM, *Capacity Repricing or in the Alternative MOPR-Ex Proposal*, FERC Docket No. ER18-1314 (April 9, 2018) at 10 n.24 (citing *PJM Load Forecast Report, January 2018*).

¹⁰ Dan Shingler, *FirstEnergy seeks federal government help for its struggling plants*, CRAIN'S CLEVELAND BUSINESS (March 29, 2018), <http://www.craincleveland.com/article/20180329/news/156551/firstenergy-seeks-federal-government-help-its-struggling-plants>.

¹¹ PJM Interconnection, *PJM Cold Snap Performance Dec. 28, 2017 to Jan. 7, 2018* at 1 (Feb. 26, 2018), available at <http://www.pjm.com/-/media/library/reports-notice/weather-related/20180226-january-2018-cold-weather-event-report.ashx>.

¹² *Id.* at 2.

¹³ National Energy Technology Laboratory, *Reliability, Resilience and the Oncoming Wave of Retiring Baseload Units, Volume I: The Critical Role of Thermal Units During Extreme Weather Events*, (March 27, 2018).

serve the increased customer demand, nor would PJM have faced ‘interconnect-wide blackouts’ without the particular generating units dispatched.”¹⁴

III. The Department Must Reject FirstEnergy’s Petition under Section 202(c)

Section 202(c) of the Federal Power Act authorizes the Department to order generators to run during times of war or other emergencies. Section 202(c) describes such emergencies as including “a sudden increase in the demand for electric energy, or a shortage of electric energy or of facilities for the generation or transmission of electric energy.”¹⁵ The Department’s definition of “emergency” in its regulations implementing Section 202(c) likewise captures a number of scenarios, all of which it describes as either “unexpected,” “sudden,” or “unforeseen.” As explained above, the orderly retirement of power plants in PJM will unfold over a period of years and in the context of ample supply of generating capacity. There is no “emergency” that could serve as the basis for using the Department’s authority under Section 202(c).

FirstEnergy’s petition seeks to stretch Section 202(c) far beyond what its text can support. Section 202(c) is a “temporary” authority aimed at emergencies; it does not give the Department authority to set national energy policy or to advantage one type of fuel for electric generation over others. After the First Oil Embargo, the Federal Power Commission declined to use its authority under Section 202(c), despite its potential for reducing oil dependence in the electric power sector. The U.S. Court of Appeals for the D.C. Circuit upheld that decision, stating:

We are fully mindful, of course, that current national policy is to discourage reliance on foreign oil, but we cannot fault the Commission for reading Section 202(c) as devoid of a solution. That section speaks of “temporary” emergencies, epitomized by wartime disturbances, and is aimed at situations in which demand for electricity exceeds supply and not at those in which supply is adequate but a means of fueling its production is in disfavor.¹⁶

FirstEnergy’s true problem is not that there is an emergency on the grid, but that its power plants lose money at current market prices. Consequently, its application is a thinly veiled attempt to use Section 202(c) as a substitute for what it could not achieve at the Commission under Sections 205 and 206. It seeks rate assistance for four years, a period that would exceed any conceivable “emergency” time frame. It would apply its rate assistance proposal to *all* coal and nuclear plants, regardless of whether each one is needed to address the purported emergency. Indeed, the only limitation FirstEnergy would impose on the scope of its requested order relates to the type of

¹⁴ PJM, *Perspective and Response of PJM Interconnection to National Energy Technology Laboratories Report Issued March 13, 2018* (April 13, 2018), <http://www.pjm.com/-/media/library/reports-notice/weather-related/20180413-pjm-response-to-netl-report.ashx?la=en>.

¹⁵ 16 U.S.C. § 824a(c).

¹⁶ *Richmond Power & Light v. FERC*, 574 F.2d 610, 615 (D.C. Cir. 1978)(internal citations omitted).

compensation these generators receive, and not whether each generator is necessary to address the supposed emergency.¹⁷

But Section 202(c) is not intended to solve generators' economic problems. As the Assistant Secretary for the Office of Electricity Delivery and Energy Reliability put it recently, "we would never use a 202[c] to stave [off] an economic issue. It's not designed for that."¹⁸ More specifically, Section 202(c) was not designed as a pretext to supersede the Commission's authority over wholesale rates. Where the parties affected by an order do not agree, Section 202(c) ensures that generators receive "just and reasonable" terms for their actions carrying out the order. But that language cannot fairly be read as an independent source of ratemaking authority apart from Sections 205 and 206, given that Section 202(c) was enacted at a time when the Federal Power Commission had authority over the Federal Power Act as a whole.

The Department acknowledged the Commission's exclusive authority over wholesale rates when it first promulgated regulations implementing Section 202(c). The Department stated that it would leave rate issues to the Commission because "this responsibility is vested in the Federal Energy Regulatory Commission (FERC) and must be addressed in its regulations."¹⁹ The Department's regulations, therefore, encourage the use of existing rate schedules for service under Section 202(c) orders, and state that when parties do not agree, FERC, not the Department, has responsibility for resolving "rate issues . . . for determination by that agency in accordance with its standards and procedures."²⁰ DOE's regulations could not be clearer as to which agency bears responsibility for rates. Nonetheless, FirstEnergy requests that the Department, rather than FERC, "step in and determine the just and reasonable compensation."²¹ Neither the Federal Power Act nor the Department's regulations authorize the Department to do so.

IV. The Defense Production Act Does Not Contain Authority to Provide Above-Market Pricing to Power Plants

The Defense Production Act was enacted in 1950, at the beginning of the Korean War. Its purpose was to ensure the availability of critical materials for the national defense, and it has been used that way for decades. As explained below, the Defense Production Act cannot be used to command favorable pricing for a favored class of power plants. Moreover, to invoke the concept of "national defense" for what is transparently a domestic effort to boost an uneconomic segment of industry would be an unprecedented abuse of the Act. The Defense Production Act has enjoyed bipartisan

¹⁷ See FirstEnergy Request at 31 (excluding from the scope of its request generators that "recover any of their capital or operating costs through rates regulated by a duly authorized state regulatory authority, municipal government, or energy cooperative").

¹⁸ Gavin Bade, UTILITY DIVE, *DOE 'would never use' emergency order for uneconomic plants, Walker says* (Feb. 20, 2018), <https://www.utilitydive.com/news/doe-would-never-use-emergency-order-for-uneconomic-plants-walker-says-1/517455/>.

¹⁹ See Economic Regulatory Administration, Energy, *Emergency Interconnection of Electric Facilities and the Transfer of Electricity to Alleviate an Emergency Shortage of Electric Power*, 46 Fed. Reg. 39,984, 39,985 (Aug. 6, 1981).

²⁰ 10 C.F.R. § 205.376.

²¹ FirstEnergy Request at 32.

support for decades and must maintain that support if it is to be re-authorized next year.²² Using this statute to favor a particular industry that is struggling in the competitive markets would threaten that support and risk the loss of an important tool that could be needed to ensure national security.

Because its purpose lies in the national defense, the authority conferred in the Defense Production Act allows certain types of market interventions that are rare in American law. Even so, as broad as it is, the Defense Production Act is not broad enough to do what the supporters of these uneconomic power plants would like. The Defense Production does not allow the government to set prices. Nor does it allow the government to force market participants to buy products or services they do not wish to buy.

Those urging the Executive branch to use the Defense Production Act to bail out power plants have not identified which provision of the Act they would use. But there are only two possibilities: the prioritization and allocation authorities contained in Sections 101(a) and (c), and the financial assistance provisions contained in Title III. Neither set of provisions can be used to force consumers to pay above-market prices for electricity.

a. The Authority to Prioritize Contract Performance and to Allocate Materials Does not Include the Authority to Force Purchases or to Set Prices

Section 101(a) of the Defense Production Act empowers the President to require priority performance of contracts or orders deemed “necessary or appropriate to promote the national defense” and to allocate materials, services, and facilities in a manner necessary to “promote the national defense.” To apply Section 101(a) to products in the civilian market, the President must also find that the material being prioritized or allocated “(1) . . . is a scarce and critical material essential to the national defense, and (2) that the requirements of the national defense for such material cannot otherwise be met without creating a significant dislocation of the normal distribution of such material in the civilian market to such a degree as to create appreciable hardship.”²³ Section 101(c) of the Act authorizes prioritization and allocation specifically for materials, equipment, and services necessary to “maximize domestic energy supplies” upon a finding that such materials are “scarce, critical, and essential—(i) to maintain or expand exploration, production, refining, transportation; (ii) to conserve energy supplies; or (iii) to construct or maintain energy facilities.”²⁴ With respect to all forms of energy, Sections 101(a) and (c) have been delegated by the President to the Secretary of Energy.²⁵

Sections 101(a) and (c) are commonly used to prioritize the performance of defense contracts over civilian contracts. For example, if a factory has a contract to supply the military with a particular item and if the need for that item becomes urgent, the Department of Defense may invoke Section 101(a) and issue a “rated order” to accelerate performance of its own contract ahead of civilian

²² 50 U.S.C. § 4564(a) (stating that the Defense Production Act “shall terminate on September 30, 2019”).

²³ *Id.* § 4511(b).

²⁴ *Id.* § 4511(c).

²⁵ Exec. Order 13603, 77 Fed. Reg. 16651 (Mar. 22, 2012).

orders at the same factory. The Department of Energy and its predecessor agencies have used the Section 101 authorities sparingly. In 1974 and 1975, the Federal Energy Administration used Section 101(a) to ensure the availability of materials necessary for timely completion of the Trans-Alaska Pipeline,²⁶ a project that had strategic importance to the United States after the First Oil Embargo. And in 2001, during the California Energy Crisis, the Department of Energy used Sections 101(a) and (c) of the Defense Production Act alongside the Natural Gas Policy Act of 1978 to ensure performance of contracts to deliver natural gas to Pacific Gas & Electric, which needed the natural gas both to serve retail customers and for electric power generation.

Providing FirstEnergy with the relief it seeks would first require that the President declare that electricity supplies are scarce. As described above, such a declaration cannot be credibly made. But even assuming it could, two further discrete government actions would be necessary: (1) the government must force PJM (or load-serving entities directly) to buy electricity from the favored class of generators, and (2) the government must force PJM (or the load-serving entities) to make those purchases at above-market rates they have not agreed to. Neither of these actions lies within the authority of the Defense Production Act.²⁷

Section 101 of the Defense Production Act gives the government the extraordinary power to force private actors to *sell* their products to the government (or its contractors) when those private actors are contractually committed to sell to other parties. But nothing in the Act would authorize the far greater intrusion of forcing private actors to make purchases against their will, even if such purchases were somehow shown to “promote the national defense” or to “maximize domestic energy supplies.” Section 101 is directed at materials found to be “scarce.” Nowhere does it contemplate that buyers would need any encouragement, much less compulsion, to buy the materials that have been prioritized or allocated.

Moreover, even were the Defense Production Act turned upside down to authorize the government to force private actors to make purchases against their will, the Act provides no authority to set the price for those purchases. The original Title IV to the Defense Production Act authorized the President to fix prices, but that authority expired in 1953.²⁸ Section 101 authorizes the President to prioritize performance of contracts,²⁹ but not to wield the far greater power of dictating the price or other terms of the contract it has prioritized. Indeed, other provisions in the Act foreclose the possibility that it may be used to set prices: Section 104 states that the authorities in Title I,

²⁶ Trans-Alaska Pipeline Priorities Assistance for Construction, 39 Fed. Reg. 34608 (Sept. 26, 1974).

²⁷ There are numerous ways in which the use of the Defense Production Act for this purpose would stray from the language of the Act and its implementing regulations. We have chosen to highlight two of the most fundamental.

²⁸ Defense Production Act Amendments of 1953, Pub. L. No. 83-95, 67 Stat. 129.

²⁹ Section 101(a) also allows the President to “require acceptance” of contracts and orders. 50 U.S.C. § 4511(a). But that authority must be read in light of the statement that it has been included “for the purpose of assuring . . . priority.” See *Hercules Inc. v. U.S.*, 24 F.3d 188, 203 (Fed. Cir 1994) *aff’d* 516 U.S. 417 (1996). The authority to require sellers of critical materials to accept government contracts for purposes of assuring priority delivery does not confer authority to require buyers to accept contracts for purposes of imposing above-market prices.

including Section 101, may not be used to impose price controls without prior authorization by Congress;³⁰ Section 707 states that the prices, terms, and conditions of sale under a prioritization or allocation order should not differ from those for “generally comparable orders or contracts;”³¹ and Section 106, which designates energy as a “strategic and critical material,” states that no provision of the Act, “by virtue of such designation,” should be read to confer any authority to control the “pricing” of any form of energy, including electricity.³²

The regulations implementing Section 101 of the Defense Production Act also show that the authority to prioritize contract performance does not confer the authority to set prices. Those regulations state that priority assistance may not be provided “when a person is attempting to . . . [s]ecure a price advantage.”³³ They also prohibit persons working under allocation or prioritization orders from “charging higher prices or imposing different terms and conditions than for comparable unrated orders.”³⁴ Finally, we note that after the Department of Energy issued its order to address the 2001 California Energy Crisis, it made clear that any changes to the price of natural gas supply contracts in California would have been authorized by the Natural Gas Policy Act, not by the Defense Production Act.³⁵

b. The Defense Production Act’s Loan and Subsidy Provisions May Not Be Used in these Circumstances

Title III of the Defense Production Act confers authority to make loans and loan guarantees in order to reduce “shortfalls of industrial resources, critical technology items, or materials essential for the national defense.”³⁶ As we explain above, there is no such shortfall. But even if such a finding could be made, loans and loan guarantees would be unavailable for these generators for two reasons. First, loans and loan guarantees under the Defense Production Act must be supported by funds appropriated for that purpose to pay for the government’s credit risk.³⁷ Because Congress has appropriated no funds to support these loans, the Department of Defense cannot issue them. Second, even if funds were appropriated, the loans and loan guarantees would be available only if “the prospective earning power of the loan applicant and the character and value of the security pledged provide a reasonable assurance of repayment of the loan in accordance with the terms of

³⁰ 50 U.S.C. § 4514(a).

³¹ *Id.* § 4557.

³² *Id.* § 4516.

³³ 15 C.F.R. § 700.55; 10 C.F.R. § 217.44.

³⁴ 15 C.F.R. §§ 700.13(a)(2) and 700.35(b); 10 C.F.R. §§ 217.33(a)(2) and 217.55(b).

³⁵ *See The California Energy Crisis and Use of the Defense Production Act: Hearing before the S. Comm. on Banking, Housing, and Urban Affairs, 107th Cong. 27 (2001) (Response to Written Questions of Senator Gramm from Eric J. Fygi: “Q.2a. Was the Natural Gas Policy Act or the Defense Production Act used to set prices under the Order? A.2a. To the extent that it might have proven necessary to ‘set prices’ under the emergency order, the authority to do so would have been the Natural Gas Policy Act.”).*

³⁶ *See* 50 U.S.C. §§ 4531- 32.

³⁷ *See id.* §§ 4531(a)(3)(A) and 4532(c)(1)(A) (incorporating provisions of the Federal Credit Reform Act).

the loan.”³⁸ The central argument of FirstEnergy’s application under Section 202(c), and of the Department’s NOPR to FERC, is that coal-fired and nuclear generators are retiring because they lose money under current market conditions – a fact underscored by FirstEnergy’s bankruptcy filing. Given this record, there could be no basis to conclude that loans to these generators come with a “reasonable assurance of repayment.”

Title III also allows for purchase commitments and subsidy payments to address national defense needs.³⁹ But electricity produced from nuclear and coal-fired power plants would not qualify for this type of support. For one, subsidy payments are available only for “raw or nonprocessed material” (which electricity is not) or to address temporary increases in transportation costs affecting critical materials (which is not the reason why aging power plants in PJM are uneconomic).⁴⁰ But, even if these eligibility criteria were overlooked, any assistance under these provisions would be limited to the lesser of the amount of uncommitted appropriated funds available,⁴¹ or \$50 million, absent an Act of Congress specifically authorizing a greater amount.⁴² Needless to say, \$50 million would be insufficient to pay for the subsidy requested by FirstEnergy. In fact, FirstEnergy Solutions’ recent bankruptcy filing reveals that \$50 million would be insufficient to cover the losses of even *one* of its coal-fired power plants for *six months*.⁴³ Providing this “drop in the bucket” of FirstEnergy’s losses would also drain almost completely the funds Congress has made available for *national defense*, not economic favoritism.

V. Section 215A of the Federal Power Act Authorizes Only Temporary Measures in Response to Grid Security Emergencies

In December 2015, Congress enacted the FAST Act, which added a new section, Section 215A, to the Federal Power Act. Section 215A authorizes the Department of Energy to issue “orders for emergency measures” in response to a “grid security emergency.” A “grid security emergency” is

³⁸ *Id.* §§ 4531(a)(2)(D) and 4532(b)(2)(D).

³⁹ *Id.* § 4533.

⁴⁰ *Id.* § 4533(c)(1)(a).

⁴¹ In the most recent appropriations act, Congress appropriated \$67 million for all Defense Production Act financial assistance activities. Consolidated Appropriations Act, 2018, Pub. L. No. 115-141 at 111.

⁴² 50 U.S.C. § 4533(a)(6)(C). The \$50 million limitation was added in the 2014 reauthorization of the Defense Production Act. *See also* 160 Cong. Rec. H7002-04 (daily ed. Jul. 29, 2014). (Statement of Rep. Campbell: “Title III authorizes the President to use loans, purchase commitments, and grants to encourage contractors to establish or expand industrial capacity and produce items that are essential to the national defense that must be domestically produced but are otherwise not economically attractive enough to have a domestic producer. These programs are usually small, typically less than \$15 million, and in the history of the DPA, going back to the Korean war, only three have exceeded \$50 million, each of which was specifically authorized by Congress.”).

⁴³ Mot. of the Debtors for Entry of an Order Authorizing the Debtors to Reject Certain Lease Agreements at 10, *In re FirstEnergy Solutions Corp., et al.*, No. 18-50757 (Bankr. N. D. Ohio Apr. 1, 2018) (explaining that, even before the recent fire, the Mansfield Plant was expected to have a cash flow shortfall of \$104 million in 2018).

defined as the occurrence or imminent danger of cyberattacks, electromagnetic pulse attacks, geomagnetic storms, and direct physical attacks that would have significant adverse effects on the reliability of critical electric infrastructure.

The retirement of coal and nuclear plants would not, of course, fit within any of these categories. Nevertheless, some have suggested the Administration use Section 215A on the idea that the potential for a successful cyberattack on natural gas operations makes the electric grid vulnerable due to its reliance on natural gas. As we explain below, Section 215A is not available to address cyber-intrusions into the natural gas supply chain and, in any case, would not support long-term cost of service rate recovery for coal and nuclear plants. But, even if the statute were available for this purpose, the potential for a successful cyber-attack on the natural gas supply chain could not credibly form the basis of any emergency finding any more than speculation of potential cyberattacks on any other supply resource or energy-related operations. The natural gas industry takes cybersecurity seriously, and continues to be proactive in taking the necessary precautions to protect its operations. Moreover, there is no evidence to conclude that an attack would cause widespread loss of operational capability.

The physical operations of natural gas production, transmission, and distribution make the system inherently reliable and resilient. Disruptions to natural gas service are rare. When they do happen, a disruption of the system does not necessarily result in an interruption of scheduled deliveries of natural gas supply because the natural gas system has many ways of offsetting the impact of disruptions. As noted in a report from MIT:

The natural gas network has few single points of failure that can lead to a system-wide propagating failure. There are a large number of wells, storage is relatively widespread, the transmission system can continue to operate at high pressure even with the failure of half of the compressors, and the distribution network can run unattended and without power. This is in contrast to the electricity grid, which has, by comparison, few generating points, requires oversight to balance load and demand on a tight timescale, and has a transmission and distribution network that is vulnerable to single point, cascading failures.⁴⁴

Moreover, Section 215A does not empower the Department to take action in response to cyberattacks directed outside the electric system. Section 215A defines “grid security emergency” to include cyberattacks directed at “electronic devices or communications networks” that are “essential to the reliability of critical electric infrastructure.” Critical electric infrastructure is defined as a subset of the “bulk-power system,” which is itself defined in Section 215 to include electric transmission and generation, but not natural gas supply chain infrastructure.

Finally, the relief FirstEnergy sought in its Section 202(c) application, and that the Department proposed in its NOPR to FERC, far exceeds what is available under Section 215A. Once the requisite finding of a “grid security emergency” is made by the President, Section 215A authorizes

⁴⁴ Massachusetts Institute of Technology, Lincoln Laboratory, *Interdependence of the Electricity Generation System and the Natural Gas System and Implications for Energy Security* (May 2013), <https://www.ll.mit.edu/mission/engineering/Publications/TR-1173.pdf>.

the Department to “issue such orders for emergency measures as are necessary in the judgment of the Secretary to protect or restore the reliability of critical electric infrastructure or of defense critical electric infrastructure during such emergency.” Orders providing for “emergency measures” may last only fifteen days before an additional emergency finding is required. The fifteen-day limitation shows clearly that when Congress used the words “emergency measures” it meant them in the ordinary sense that emergency measures are temporary and short-lived. FirstEnergy’s request that certain favored power plants receive rate recovery for four years, or the Department’s NOPR, which was of indefinite duration, would far exceed an authority limited to providing temporary, emergency relief.

V. Conclusion

For the foregoing reasons, the Department must reject FirstEnergy’s petition under Section 202(c) of the Federal Power Act, as well as any other related action under the Defense Production Act, Section 215A of the Federal Power Act or any other authority that provides unwarranted “emergency” relief.

Sincerely,

Advanced Energy Economy

The American Petroleum Institute

The American Wind Energy Association

The Electric Power Supply Association

The Interstate Natural Gas Association of America

The Natural Gas Supply Association



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May 7, 2018

Secretary Rick Perry
U.S. Department of Energy
1000 Independence Ave. SW
Washington, DC 20585
AskOE@hq.doe.gov

Dear Secretary Perry,

Pretty much anyone even tangentially connected to the electric power industry waits with bated breath for DOE's decision on the March 29 request by First Energy Solutions that the Department declare a national emergency under Section 202(c) of the Federal Power Act for *all* nuclear and coal power plants in PJM for a minimum of four years.¹ Such an action would be unprecedented, unjustified under the authorities in the statute, and would cost consumers tens of billions of dollars. That's why Public Citizen joins the diverse protest chorus of other groups that formally oppose First Energy's multi-billion dollar ratepayer bailout request, and, while we're all waiting on this monumental decision, we submit several requests designed to introduce transparency into this process.

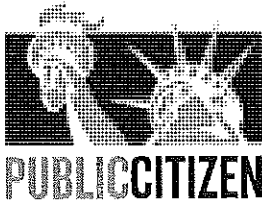
All Submissions and Communications On First Energy's Request Must Be Part of Public Record

Given the enormous implications the DOE's decision will have on consumers, energy markets, the future of electricity policy—and the legal work load of dozens of trade associations, public interest groups and various companies, states and a whole slew of other entities too numerous to name—the DOE must treat this proceeding as it would a public docket, providing a comprehensive public record not only of submissions to DOE regarding First Energy's request, but all communications, records and other material reflecting DOE's information gathering with outside parties and other Federal agencies (including the White House) on the First Energy 202(c) request. First Energy's request is so unprecedented, and the consequences of granting such emergency authority so dire, that the public interest can only be satisfied with a complete and open public docket. Right now, the public is denied access to any comprehensive, official record of comments, submissions and other key documentation that the DOE could use to make a decision on First Energy's unprecedented request.

Our survey of publicly-available submissions to DOE on the First Energy request show unanimity in opposition to granting an emergency under 202(c). For example, on April 5 the PJM Industrial Customer Coalition submitted a formal Protest of First Energy's request², as did

¹ <https://statepowerproject.files.wordpress.com/2018/03/fes-202c-application.pdf>

² http://blogs.edf.org/energyexchange/files/2018/04/Protest-of-PJM-Consumer-Representatives_FES-Emergency-Order-Request-A6290222.pdf



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the American Public Power Association on April 9.³ The American Petroleum Institute (a formidable lobby shop that knows a thing or two about cutting through the flak and going straight to the top decision maker) bypassed DOE entirely in its request to the President of United States to reject First Energy's request.⁴ On April 24, the Advanced Energy Economy submitted comments requesting the Department reject First Energy's request.⁵

Opinions and Communications by and with White House Lawyers As Referenced in the August 4, 2017 Letter from Robert Murray Must Be Made Public As Part of This Proceeding

The inception of First Energy's radical Section 202(c) request appears to originate with Robert Murray, Chairman, President and Chief Executive Officer of Murray Energy Corporation. An infamous memo dated August 4, 2017 signed by Mr. Murray, summarizes a series of meetings and communications the coal magnate had with a variety of Trump Administration officials—including the President of the United States—detailing Murray's efforts a year ago to push the Administration to declare a national emergency for First Energy's failing power plants under 202(c).⁶

It is important to note that *four days* after Mr. Murray authored this letter to the Trump Administration demanding action on declaring an emergency under 202(c), Murray Energy Corporation gave \$1 million to America First Action, Inc., a SuperPAC tied to promoting President Donald Trump and his Administration.⁷ Perhaps the \$1 million helped the President of the United States focus on the letter's contents.

Murray writes in the letter that he “personally” spoke with President Trump at a July 25 rally in Youngstown, Ohio event requesting “that President Trump direct Energy Secretary Rick Perry to invoke Section 202(c) of the Federal Power Act declaring an emergency on the electric power grid.” [at Page 1]. Murray claims President Trump then “turned to Energy Secretary Rick Perry and said three times ‘I want this done’”. [at Page 1]

Murray's letter continues: “It's been 3 weeks since we last talked to you [about declaring an emergency under 202(c)] and there seems to be no resolution and no action . . . Our understanding is that White House lawyers have some concern regarding 202 C . . . While we are trying to reduce the level of concern of White House lawyers—and we think we are having some success, time is a luxury we do not have. We can understand why [White House] lawyers don't want to risk losing . . . Even if we are wrong and this fails, at least we can tell our people

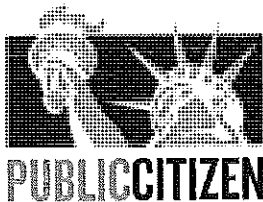
³ www.publicpower.org/periodical/article/association-urges-doe-reject-firstenergy-plea-emergency-order

⁴ www.api.org/~media/Files/News/Letters-Comments/2018/4-13-18-Ltr-to-the-President-Federal-Power-Act-Section-202c.pdf

⁵ www.aee.net/articles/aee-urges-doe-reject-emergency-support-of-coal-nuclear-plants

⁶ www.documentcloud.org/documents/3936141-Murray-s-letters-to-Trump-administration.html

⁷ <http://docquery.fec.gov/cgi-bin/forms/C00637512/1199534/sa/ALL>



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you did everything possible and that you left no stone unturned . . . We need action. DOE must enact 202 C.” [Murray letter, at Page 3]

It is clear that First Energy’s request began not with its March 29, 2018 demand, but rather with Robert Murray’s formal initiative beginning on July 25, 2017. Therefore, records of all communications and meetings described in Robert Murray’s August 4, 2017 letter—including those describing the legal opinions of White House lawyers as described in the letter—must be made public as part of this proceeding.

Communications Regarding the Design, Development and Dissemination of a NETL Report That Was Publically Released 48 Hours Before First Energy’s Request Must Be Made Public As Part of this Record

The First Energy request prominently features a U.S. Department of Energy National Energy Technology Laboratory (NETL) study⁸ that purports to show that “coal was the most resilient form of power generation” during the 13-day cold snap that hit the East Coast beginning December 27, 2017. Although the NETL report is dated March 13, DOE did not publicly release it until March 27 (“The new report, released today...” reads the Office of Fossil Energy web site dated March 27, 2018).⁹

It seems an incredible coincidence that First Energy’s 202(c) request so prominently features a report that was not released to the public 48 hours before First Energy’s request.

But not really. Less than two months before First Energy’s request, Doug Matheney, special adviser to Energy Secretary Rick Perry, told the West Virginia Mining Symposium in Charleston, West Virginia on January 31, 2018 that he’s “here to help” the coal industry; that his “one purpose” for going to serve as Secretary Perry’s top advisor is to help the U.S. coal industry; that the DOE’s job is to give coal “a positive outlook”; and that DOE must “understand the importance of coal to the generation of electricity and to the reliability and resilience of the grid.”¹⁰ I believe Mr. Matheney—after all, prior to his current senior advisor position to Energy Secretary Perry, he ran the National Mining Association’s Count on Coal Initiative in Ohio.¹¹

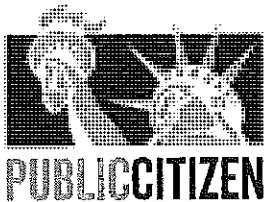
⁸ *Reliability and the Oncoming Wave of Retiring Baseload Units, Volume I: The Critical Role of Thermal Units During Extreme Weather Events*, DOE/NETL-2018/1883, www.netl.doe.gov/research/energy-analysis/search-publications/vuedetails?id=2594

⁹ www.energy.gov/fe/articles/netl-study-highlights-importance-coal-power-generation-during-bomb-cyclone-power-demands

¹⁰ Taylor Kuykendall, Energy department adviser assures US coal industry he's 'here to help', *S&P Market Intelligence*, January 31, 2018,

<https://platform.mi.spglobal.com/web/client?auth=inherit#news/article?id=43381678&cdid=A-43381678-12327>

¹¹ Hannah Northey, “Political hires climb aboard,” *E&E News*, March 8, 2017



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To allay concerns that the DOE is using its Laboratories as advocacy tools for select private interests, all communications and records regarding the design, development and dissemination of the NETL report must be made public as part of this record.

Both First Energy's 202(c) Request And Possible Action Under the 1950 Defense Production Act Must Be Rejected Because No Emergency Exists From The Company's Bankruptcy

The Department's regulations defining an "emergency" for the purposes of 202(c) appear to prohibit its use for the kind of economic issues faced by First Energy's bankruptcy: "Situations where a shortage of electric energy is projected due solely to the failure of parties to agree to terms, conditions or other economic factors relating to service, generally will not be considered as emergencies unless the inability to supply electric service is imminent."¹²

Indeed, PJM's March 30 response to First Energy's request concludes that "PJM can state without reservation there is no immediate threat to system reliability."¹³ And a subsequent May 3 *Generation Deactivation Notification Update* concludes that the retirement of 4,000 MW identified in the First Energy request poses no reliability concern whatsoever.¹⁴ Similar conclusions were reached last year in Public Citizen's congressional testimony¹⁵ and Public Citizen filings in Federal Energy Regulatory Commission Docket No. RM18-1.¹⁶ Indeed, FERC ruled 5-0 in its January 8, 2018 order rejecting the Department of Energy's first attempt to bail out First Energy's uneconomic power plants, concluding that "the extensive comments submitted by the RTOs/ISOs do not point to any past or planned generator retirements that may be a threat to grid resilience."¹⁷

While First Energy has not publicly requested it, rumors are circulating that—given the uphill legal battle that taking action under 202(c) presents—the President will act using the *1950 Defense Production Act*.¹⁸ Bailing out First Energy's power plants (or all nuclear and coal power plants in PJM, as First Energy has requested) utilizing the 1950 DPA is even more dubious than using 202(c). The 1950 DPA authorizes the federal government to inject cash into companies essential for national defense in order to protect domestic supplies of key products.

¹² 10 CFR § 205.371

¹³ At Page 1, <https://docs.house.gov/meetings/IF/IF03/20180412/108114/HHRG-115-IF03-20180412-SD050.pdf>

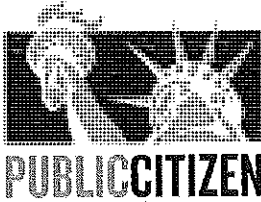
¹⁴ www.pjm.com/-/media/committees-groups/committees/teac/20180503/20180503-teac-generation-deactivation-notification.ashx

¹⁵ www.citizen.org/system/files/case_documents/testimony-tyson-slocum-energy-and-commerce-committee-october-2017_0.pdf

¹⁶ <https://elibrary.ferc.gov/idmws/common/opennat.asp?fileID=14721747>

¹⁷ At 15, <https://elibrary.ferc.gov/idmws/common/opennat.asp?fileID=14793020>

¹⁸ www.fema.gov/media-library-data/20130726-1650-20490-5258/final_defense_production_act_091030.pdf



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But the First Energy bankruptcy presents no energy supply emergency, and the eventual retirement of these power plants pose no threat to supplying energy for national defense, and no national security emergency exists as a result of the First Energy bankruptcy. Past uses of the 1950 DPA include the 2000-01 California Deregulation Crisis¹⁹ (power outages caused by one of the largest corporate market manipulation frauds in history), and more recently in 2012 to provide assistance to the biofuels industry to provide needed fuel supplies for military ships and aircraft. Utilizing the 1950 DPA to bail out failing nuclear and coal power plants would cost consumers and/or taxpayers billions of dollars—an amount far higher than Congress typically allocates for the 1950 DPA. Indeed, the Omnibus spending bill passed earlier this year allocated \$67.4 million for the 1950 DPA.²⁰

Finally, government action isn't needed because the power market has long adjusted to such bankruptcies: bondholders of secured debt on such bankrupt facilities often sell such assets for cheap to plenty of interested buyers. For example, the private equity owner of the National Basketball Association's Detroit Pistons just bought himself an 800 MW natural gas power plant in PJM from NRG's bankrupt GenOn subsidiary²¹. Perhaps First Energy's approach has been all wrong: instead of seeking handouts from consumers and taxpayers, instead owners of uneconomic power plants should be stroking the egos of the proprietors of various professional sports teams as prospective purchasers of generation assets. The power plants could have their own mascots, and maybe even additional revenues could be procured through naming rights.

Respectfully submitted,

Tyson Slocum, Energy Program Director
Public Citizen, Inc.
215 Pennsylvania Ave SE
Washington, DC 20003
(202) 588-1000
tslocum@citizen.org

Cc:

Mr. Bruce Walker, Assistant Secretary
Office of Electric Reliability and Energy Reliability
bruce.walker@hq.doe.gov

Ms. Catherine Jereza, Deputy Assistant Secretary
Office of Electricity Delivery and Energy Reliability
catherine.jereza@hq.doe.gov

¹⁹ www.gpo.gov/fdsys/pkg/CHRG-107shrg76811/html/CHRG-107shrg76811.htm

²⁰ Public Law No. 115-141, www.congress.gov/115/bills/hr1625/BILLS-115hr1625enr.pdf

²¹ FERC Docket No. EC18-70.

From: Admin
To: AskOE
Subject: Letter to President Trump regarding First Energy Solutions
Date: Tuesday, May 08, 2018 4:39:41 PM
Attachments: FINAL AFEC President Letter.pdf

May 8, 2018
President Donald J. Trump
The White House
1600 Pennsylvania Ave.
Washington, D.C. 20500
Dear Mr. President:

As the Alliance for Energy Choice – a grassroots organization dedicated to keeping energy costs low in Ohio – we urge you to reject the unprecedented request from FirstEnergy Solutions (FES) for an emergency order under Section 202(c) of the Federal Power Act. Recent news reports indicate that your Administration may also be looking into possible use of the Defense Production Act and other federal statutes in light of the FES application.

This request is likely a last and desperate attempt by FES to seek a government-funded bailout as they look to escape the consequences of their fiscal mismanagement and poor decision-making.

FES first sought a bailout from Ohio consumers using bill riders, but so far, this attempt at hijacking rates has been held at bay. FES next sought a bailout through a Grid Resilience Pricing Rule but were again thwarted by pro-market ideals, this time from the Federal Energy Regulatory Commission.

Now FES is turning to you and asking the President of The United States to use a wartime power to shield them from competition by shifting financial risk onto consumers.

If this were to be granted, it would not only represent an historic use of a wartime power in a time of peace, but also run contrary to your administration's mission of growing the American economy through competition, increasing our global competitiveness, and modernizing our infrastructure. Any attempt to alter energy markets in this way would result in a significant step backwards in accomplishing these important public-policy goals and undoubtedly increase energy costs for Americans.

Energy competition has been a boon for consumers and businesses, as they continue to enjoy historically low energy rates, while at the same time seeing an increase in reliability.^{[1], [2]} This energy boom has also created thousands of new, good-paying jobs, providing a boost to the American economy and increasing this country's energy independence. Abundant, low-cost Utica and Marcellus Shale gas that fuels many of our factories and power plants in the Appalachian region would surely suffer as a result of any action taken to subsidize competing plants and fuel sources.

As you are aware, the powers granted to your office by the Defense Production Act of 1950 are vast. They were first derived in the aftermath of the Second World War to ensure adequate domestic production during times of war. By comparing their shrinking profits and falling stock prices to a national crisis on the scale of war, FES asks your office and the powers granted to you under this law to consider their company-specific, self-inflicted financial woes as a national emergency. It would be both unprecedented and unfathomable to use wartime powers to bailout one single company who has not been able to show that their assets are critical to electric grid reliability or national defense. We trust you will see this FES "Hail Mary" attempt at superseding free market competition as harmful to the plights of individual Americans and counter to American economic principles. Please reject this desperate plea and protect energy competition and the free market in the United States.

Thank you for your consideration of our request and we look forward to working with you and your Administration in continuing to pursue our shared vision of providing American businesses and consumers with affordable, reliable, American-made energy.

Sincerely,

The Alliance for Energy Choice

Cc: Honorable James Richard Perry, Secretary of Energy

The Alliance is a non-profit advocacy organization made up of independent power producers and power plant developers. We promote fairness and competition among electric utilities and advocate for market solutions that will ensure an adequate and fairly-priced supply of electric power to Ohio's residents and businesses. Alliance members include: Calpine, Eastern Generation, NRG, Vistra Energy, and The Energy Professionals of Ohio.

[1] "PJM's Evolving Resource Mix and System Reliability." March 30, 2017. Accessed March 14, 2018.

<http://www.pjm.com/~media/library/reports-notice/special-reports/20170330-pjms-evolving-resource-mix-and-system-reliability.ashx>.

[2] Average Price of Electricity to Ultimate Customers by End-Use Sector,," U.S. Energy Information Administration. February 27, 2018. Accessed March 14, 2018. https://www.eia.gov/electricity/monthly/epm_table_grapher.php?t=epmt_5_6_a.

Alliance for Energy Choice

VIA EMAIL

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Washington, D.C. 20500

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Marcellus Shale gas that fuels many of our factories and power plants in the Appalachian region would surely suffer as a result of any action taken to subsidize competing plants and fuel sources.

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From: Herzog, Megan (AGO)
To: [AskOE](#)
Cc: [Tepper, Rebecca \(AGO\)](#); [Courchesne, Christophe \(AGO\)](#)
Subject: Objections to FirstEnergy Solutions Corp.'s Request for Emergency Order Pursuant to Federal Power Act Section 202(c)
Date: Wednesday, May 09, 2018 5:41:35 PM
Attachments: [AGO Comments on DOE_s202\(e\) request \(5.9.2018\).pdf](#)

Dear Secretary Perry:

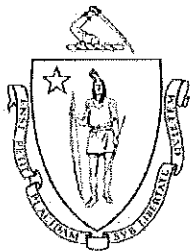
Attached please find a letter to you from the Attorneys General of Massachusetts et al. regarding objections to FirstEnergy Solutions Corp.'s request for an emergency order pursuant to Federal Power Act section 202(c).

Please do not hesitate to contact me with any questions or concerns regarding this submission.

Thank you,

Megan M. Herzog

Special Assistant Attorney General
Environmental Protection Division
Massachusetts Office of the Attorney General
One Ashburton Place
Boston, MA 02108
(617) 963.2674
megan.herzog@state.ma.us



THE COMMONWEALTH OF MASSACHUSETTS
OFFICE OF THE ATTORNEY GENERAL
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MAURA HEALEY
ATTORNEY GENERAL

(617) 727-2200
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May 9, 2018

Via Electronic Mail: AskOE@hq.doe.gov

The Honorable James Richard Perry
Secretary of Energy
U.S. Department of Energy
1000 Independence Avenue SW
Washington, DC 20585

Re: Objections to FirstEnergy Solutions Corp.'s Request for Emergency Order Pursuant to Federal Power Act Section 202(c)

Dear Secretary Perry:

The Attorneys General of Massachusetts, Connecticut, Illinois, Maryland, North Carolina, Oregon, Rhode Island, Virginia, Washington, and the District of Columbia submit these objections to the request dated March 29, 2018 by FirstEnergy Solutions Corp. and its subsidiaries (collectively "FirstEnergy") to the Secretary of Energy ("Secretary") for an emergency order under section 202(c) of the Federal Power Act, 16 U.S.C. § 824a(c) ("section 202(c)") (the "Request").¹ Specifically, the Request asks you to: i) find an emergency exists in the control area of the PJM Interconnection, L.L.C. ("PJM") due to an alleged "system resiliency" risk, ii) order certain merchant nuclear and coal-fired generators with on-site fuel supply to enter into multi-year contracts with PJM, and iii) order PJM to pay those generators at above-market rates that provide for "full recovery of all costs necessary to ensure continued operations."²

The undersigned Attorneys General have a significant interest in protecting public health and welfare and electric customers from the pollution, increased costs, and other harms associated with subsidizing uneconomic coal-fired and nuclear generators at above-market rates. Abusing section 202(c) in the manner requested by FirstEnergy would set a dangerous precedent that threatens all of our states, including those located outside of PJM's service territory.

The Request is legally flawed, and you should unequivocally deny it. Because

¹ See Letter from Rick C. Giannantonio, General Counsel, FirstEnergy Solutions Corp. et al., to James Richard Perry, Sec'y of Energy, U.S. Dep't of Energy [DOE] (Mar. 29, 2018) [hereinafter Request].

² *Id.* at 1, 31.

FirstEnergy fails to identify any “emergency,” the requested section 202(c) order would be unlawful and *ultra vires*. Furthermore, the requested order would undermine competitive regional power markets, burden customers with excessive costs, undercut state energy laws and policies, and exacerbate pollution and public health harms.

I. FirstEnergy’s Declining Profits and Generalized Market Grievances Do Not Constitute an “Emergency.”

Issuing a section 202(c) order to address the declining economics of certain generators would be a grave abuse of the Federal Power Act. Section 202(c) explicitly authorizes the Secretary to issue temporary orders only in wartime or other “emergency” situations resulting from “sudden” electricity demand spikes or supply shortages.³ The “sudden” “emergenc[ies]” contemplated in section 202(c) do not include inefficient generators’ failure to turn a profit or their orderly displacement by other resources—a natural consequence of competitive markets.

Though the Federal Power Act does not define the terms “emergency” or “sudden,” the plain meaning of these terms indicates that Congress intended section 202(c) authority to be invoked rarely, in response to acute events that demand immediate response. As the D.C. Circuit Court of Appeals has recognized, the text dictates that circumstances triggering a section 202(c) order are specific, unexpected, urgent, and temporary.⁴

The Department of Energy’s (“Department”) interpreting regulations and historical use of section 202(c) authority accord with the text’s plain meaning. The Department defines an “emergency” as, *inter alia*, an “unexpected” supply shortage, which “may be the result of weather conditions, acts of God, or unforeseen occurrences not reasonably within the power of the affected ‘entity’ to prevent.”⁵ The Department’s regulations further state that section 202(c) orders “are envisioned as meeting a *specific* inadequate power supply situation.”⁶ Accordingly, the Department has rarely exercised its section 202(c) authority. Past emergency orders typically have responded to acute crises such as blackouts or severe storms.⁷

The Request fails to show that any specific, unexpected, or urgent supply threat exists in PJM. The Request instead relies primarily on general predictions that some aging U.S. coal-fired and nuclear generators will retire over the next decade. The Request specifically identifies three

³ 16 U.S.C. § 824a(c)(1).

⁴ See *Richmond Power & Light v. FERC*, 574 F.2d 610, 615 (D.C. Cir. 1978) (stating that section 202(c) “speaks of ‘temporary’ emergencies, epitomized by wartime disturbances, and is aimed at situations in which demand for electricity exceeds supply”). See also *Fed. Power Comm’n v. Fla. Power & Light Co.*, 404 U.S. 453 n.1 (1972) (relating section 202(c) to “the exigencies of ‘war’”); *Duke Power Co. v. Fed. Power Comm’n*, 401 F.2d 930, 944 (D.C. Cir. 1968) (stating that section 202(c) “relate[s] exclusively to temporary interconnections during national emergencies”).

⁵ 10 C.F.R. § 205.371 (other examples may include a “sudden” demand spike, a fuel shortage, “regulatory action” prohibiting the use of certain generators, or “[e]xtended periods of insufficient . . . supply” due to planning failures).

⁶ *Id.* (emphasis added).

⁷ See, e.g., *DOE’s Use of Federal Power Act Emergency Authority*, DOE, <https://www.energy.gov/oe/services/electricity-policy-coordination-and-implementation/other-regulatory-efforts/does-use>.

PJM nuclear assets that are scheduled (but not certain) to retire several years from now, in 2020–2021. The Request also cites FirstEnergy’s long-anticipated bankruptcy filings and its general frustration with the fact that competitors are outperforming its generators in PJM markets.⁸ Long-term trends, possible future retirements, and FirstEnergy’s dissatisfaction with its declining profits do not constitute a “sudden” “emergency” within the meaning of section 202(c). Retirements of uncompetitive coal-fired and nuclear generators are the result of economics, the natural evolution of technology, and shifts in policy.⁹ Such trends are natural in a competitive market, and are far from the wartime disturbances or other unforeseen events contemplated in section 202(c).¹⁰ The Secretary’s use of section 202(c) authority to interfere with the operation of competitive electricity markets in order to privilege certain fuels or suppliers would represent a dramatic expansion of the Secretary’s emergency authority.¹¹

II. Impending and Uncertain Generator Retirements Pose No Immediate Threat.

As the Federal Energy Regulatory Commission (“Commission”) and PJM have confirmed, impending coal-fired and nuclear generator retirements pose no emergency threat to power supply in PJM or elsewhere.¹² PJM’s performance during recent extreme winter weather affirms this.¹³

The Request relies heavily on a single National Energy Technology Laboratory study (“NETL Study”) concluding that demand in PJM during the December 2017–January 2018 cold snap (the “Cold Snap”) “could not have been met without coal.”¹⁴ But the NETL Study’s analysis has critical defects. It mistakenly concludes that coal-fired generation was critical to reliability because coal-fired generation disproportionately increased during the Cold Snap. Actually, this increase was due to the fact that more expensive and less efficient plants, such as the coal-fired plants identified in the study, are only dispatched when demand is high—not due to any attributes particular to coal-fired generation.¹⁵ The NETL Study’s conclusion fails to

⁸ See Request at 7–8, 13, 20–22.

⁹ JUDY CHANG ET AL., BRATTLE GROUP, ADVANCING PAST “BASELOAD” TO A FLEXIBLE GRID 8–13 (2017), available at <https://tinyurl.com/y7wwalwt>.

¹⁰ See PAUL HIBBARD ET AL., ANALYSIS GROUP, ELECTRICITY MARKETS, RELIABILITY AND THE EVOLVING U.S. POWER SYSTEM 4–5 (2017), available at <https://tinyurl.com/ybx9psbf> (“The retirement of aging resources is a natural element of efficient and competitive market forces, and where markets are performing well, . . . mainly represent[s] the efficient exit of uncompetitive assets, resulting in long-run consumer benefits.”).

¹¹ See *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2444 (2014) (agency’s statutory interpretation is unreasonable where “it would bring about an enormous and transformative expansion in [the agency’s] regulatory authority without clear congressional authorization”).

¹² See generally *Grid Reliability and Resilience Pricing*, 162 FERC ¶ 61,012 (2018); Letter from Vincent P. Duane, PJM, to James Richard Perry, Sec’y of Energy (Mar. 30, 2018), available at <https://tinyurl.com/PJMletter> [hereinafter PJM Comments]. Accord DOE, STAFF REPORT TO THE SECRETARY ON ELECTRICITY MARKETS AND RELIABILITY 63, 100 (2017).

¹³ See *infra* text accompanying notes 18–19.

¹⁴ See NAT’L ENERGY TECH. LAB., RELIABILITY, RESILIENCE AND THE ONCOMING WAVE OF RETIRING BASELOAD UNITS, VOL. I: THE CRITICAL ROLE OF THERMAL UNITS DURING EXTREME WEATHER EVENTS 17 (2018).

¹⁵ See ALISON SILVERSTEIN, ROB GRAMLICH, & MICHAEL GOGGIN, GRID STRATEGIES LLC, A CUSTOMER-FOCUSED

account for a key fact: that certain resources were dispatched is not evidence the system lacked (or will lack during future events) other resources that could have been called upon instead to meet market demand and maintain reliability.

The Request cites the defective NETL Study as evidence that a whole category of coal-fired and nuclear generators should be subsidized by electric customers at above-market rates for a multi-year period (or perhaps indefinitely).¹⁶ FirstEnergy's depiction of system performance and needs is deeply flawed. The system's preparedness for, and relatively modest price spikes during, the Cold Snap reflect significant actions PJM and other Northeast and Mid-Atlantic grid operators have taken to improve winter reliability since the 2014 Polar Vortex.¹⁷ PJM has more than enough capacity to meet demand, even in extreme weather.¹⁸ Notably, coal-fired and nuclear generators were not immune from outages during the Cold Snap, while other resources such as hydro, wind, and natural gas played vital roles in maintaining reliability.¹⁹ There is no evidence that a system with fewer coal-fired and nuclear generators, following such generators' orderly exit from the markets, would perform worse during future extreme weather events.²⁰

The Request claims, without support, that "[u]nless immediate action is taken," PJM is "likely" to experience "load-shedding (or worse)."²¹ Yet, PJM recently sent a letter to the Secretary "stat[ing] without reservation there is no immediate threat to system reliability" should the FirstEnergy units retire as announced, and further, should PJM identify any reliability issues, it has "a range of tools available . . . to induce assets to remain temporarily on-line."²² Per its standard, Commission-approved procedures, PJM responded to FirstEnergy's announced retirements by analyzing system reliability. PJM concluded that impending generator

FRAMEWORK FOR ELECTRIC SYSTEM RESILIENCE 7 (2018), available at <https://tinyurl.com/y9b4347t> ("No single unit or type of generation is critical or resilient in itself. . . . There is no evident need to compensate generators or other assets for bulk power system resilience beyond the engineering-based reliability services already being procured.").

¹⁶ See Request at 4–9, 32.

¹⁷ See, e.g., *January's Cold Weather Affects Electricity Generation Mix in Northeast, Mid-Atlantic, U.S.* ENERGY INFORMATION ADMIN. (Jan. 23, 2018), <https://www.eia.gov/todayinenergy/detail.php?id=34632>.

¹⁸ See *Update: PJM System Performing in Winter Storm Grayson*, PJM INSIDE LINES (Jan. 4, 2018), <https://tinyurl.com/yangm9wj> ("During the cold weather, PJM has had adequate power supplies and maintained operating reserve margins. There have been no concerns with fuel availability.").

¹⁹ See PJM INTERCONNECTION, PJM COLD SNAP PERFORMANCE DEC. 28, 2017 TO JAN. 7, 2018 13–21 (2018), available at <https://tinyurl.com/ycetjvag>; *Update 2 – Entergy Shuts Massachusetts Pilgrim Nuclear Plant During Blizzard*, REUTERS, Jan. 4, 2018, <https://tinyurl.com/y7smj9b3> (reporting that ISO New England's system performed well during the Cold Snap even with very little coal-fired generation and despite shutdown of the 688-megawatt Pilgrim nuclear power plant due to downed power lines).

²⁰ Cf. *Grid Reliability and Resilience Pricing*, 162 FERC ¶ 61,012 (2018) (Glick, C., concurring) (stating there was "no evidence in the record to suggest that temporarily delaying the retirement of uncompetitive coal and nuclear generators would meaningfully improve the resilience of the grid").

²¹ Request at 9. See also *id.* at 27.

²² See PJM Comments at 1.

retirements pose no immediate threat.²³ In sum, there is no indication, in the Request or otherwise, that Secretarial action is necessary or appropriate at this time.²⁴

III. The Requested Order Would Increase Prices and Pollution and Undermine State Energy Policies, With No Clear Reliability Benefits.

FirstEnergy's requested order would impose substantial, unreasonable costs on electric customers and the public, with no demonstrable system benefits. The Request provides no assessment of customer costs or the value of the so-called "fuel security and diversity" benefits of coal-fired and nuclear generators.²⁵ As outlined in separate comments submitted to the Commission by certain of the undersigned Attorneys General together with state agencies and consumer advocates (attached hereto as *Exhibit A*), subsidizing uneconomic generators at above-market rates would raise prices and force customers to bear the very economic risks that wholesale markets were designed to avoid. Furthermore, the requested section 202(c) order would undermine state policies to protect public health and ratepayers, including choices to promote renewable and alternative energy generation. Prolonging the operation of uncompetitive coal-fired power plants that would otherwise be replaced by cleaner resources would harm air quality and threaten progress toward our states' climate and clean energy goals.²⁶

* * * *

In general, the undersigned Attorneys General vehemently oppose extraordinary federal measures in response to FirstEnergy's Request or other section 202(c) applications, or action under the Defense Production Act.²⁷

For all of the foregoing reasons, the undersigned Attorneys General respectfully urge the Secretary to **DENY** FirstEnergy's legally flawed Request.

Please do not hesitate to contact us should you wish to engage us further in this matter.

²³ See Transmission Expansion Advisory Comm., PJM, Generation Deactivation Notification Update (May 3, 2018), available at <https://tinyurl.com/y7pjxk9j>.

²⁴ Furthermore, the requested order could conflict with action already underway in Commission Docket No. AD18-7, which the Commission initiated to evaluate the so-called resilience of the bulk power system. See *Grid Resilience in Regional Transmission Organizations and Independent System Operators*, 162 FERC ¶ 61,012 (2018).

²⁵ See Request at I.

²⁶ See Initial Comments of the Attorneys General of Massachusetts et al., FERC Docket No. RM18-1, at 43–52 (Oct. 23, 2017) (attached hereto as Exhibit A).

²⁷ See Letter from Senator Joe Manchin III to President Donald J. Trump (Apr. 18, 2018), available at <https://tinyurl.com/y7mdmjgx> ("urg[ing] [the Trump] Administration to consider using . . . the Defense Production Act of 1950 to prevent the impending retirement of numerous coal-fired and nuclear power plants").

Sincerely,

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Exhibit A:

**Initial Comments of the Attorneys General of Massachusetts et al.,
Federal Energy Regulatory Commission Docket No. RM18-1
(Oct. 23, 2017)**

**UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION**

**Grid Reliability and Resilience)
Pricing)**

Docket No. RM18-1-000

**INITIAL COMMENTS OF THE ATTORNEYS GENERAL OF MASSACHUSETTS,
CALIFORNIA, CONNECTICUT, ILLINOIS, MARYLAND, NORTH CAROLINA,
OREGON, RHODE ISLAND, VERMONT, AND WASHINGTON, CONNECTICUT
DEPARTMENT OF ENERGY AND ENVIRONMENTAL PROTECTION, RHODE
ISLAND DIVISION OF PUBLIC UTILITIES AND CARRIERS, AND
NEW HAMPSHIRE OFFICE OF THE CONSUMER ADVOCATE**

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The undersigned Attorneys General, state agencies, and state consumer advocates (the “State Commenters”) hereby submit these initial comments in response to the Federal Energy Regulatory Commission’s (the “Commission”) Notice, dated October 2, 2017, inviting comments on a proposed rule regarding “grid reliability and resilience pricing,” which was released by the Department of Energy (“DOE”) on September 29, 2017 and published in the Federal Register on October 10, 2017. 82 Fed. Reg. 46,940 (the “Proposal”).¹

The Proposal is unsupported by law, lacks any reasoned basis or grounding in any supporting factual record, contains no analysis of its costs, and would damage the country’s competitive power markets in a manner likely to impose unreasonable and unnecessary costs on electric customers and profoundly undermine state energy laws and policies. On behalf of our states and our residents, the State Commenters urge the Commission not to finalize the Proposal.²

SUMMARY

DOE asks the Commission to establish a new regulatory regime that requires electric customers to pay certain uneconomic generating resources their full cost of service, under new tariffs administered by the operators of the nation’s otherwise competitive wholesale markets. DOE asserts this is necessary to ensure system “resiliency,” a term that lacks any accepted or legal definition. Without providing *any* estimate of what the Proposal would cost electric customers, DOE urges the Commission to implement the Proposal before this coming winter, to

¹ On October 4, 2017, staff for the Commission issued a request seeking responses during the comment process to thirty questions about the Proposal.

² The State Commenters recognize the numerous state consumer advocates and state public utility commissions that are submitting complementary comments on behalf of ratepayers and other important constituencies.

avoid further retirements of coal and nuclear power plants that allegedly would retire without these payments.

DOE proposes these sweeping changes, but provides the Commission with no lawful basis to adopt the new tariff requirements. DOE does not analyze how its Proposal would affect the wholesale electricity markets, provides no assessment of the Proposal's costs, makes no attempt to define or quantify the Proposal's benefits, and provides no support for making such a dramatic change on an expedited basis. DOE fails to show (or even argue) that the current regulatory construct is unjust and unreasonable, a finding the Federal Power Act requires for the Commission to take the proposed action.

The State Commenters oppose the Proposal for several reasons, which are explained in the detailed comments below:

- The Proposal violates federal law by failing to incorporate a finding of unjust and unreasonable rates under section 206 of the Federal Power Act or to provide an assessment of the resulting costs, as is required for Commission action of this kind. *See pp. 3-7.*
- The Proposal violates the Administrative Procedure Act in two separate ways: (1) by failing to provide the public with adequate notice or reasonable time for meaningful input and (2) by failing to explain or provide record support for its drastic regulatory changes, which are inconsistent with the Commission's long-standing commitment to competitive wholesale electric markets as an essential mechanism under the Federal Power Act to ensure just and reasonable rates, as well as with its efforts to refine those markets through responsive and inclusive

processes in conjunction with Regional Transmission Organizations (“RTOs”) and their stakeholders. *See* pp. 7-20.

- The Proposal’s underlying assumption—that electric system reliability or “resilience” is in danger because aging, uneconomic resources are retiring—is wrong. Under the Commission’s leadership, the bulk power system is reliable today and will continue to be so in the future. Both DOE’s own recent Staff Report and other independent analyses confirm that the risks that supposedly justify the Proposal are manageable and do not justify emergency action favoring particular fuels, but rather counsel for study of continued development of fuel-neutral solutions. Moreover, as independent analyses and state experience show, there is no evidence supporting the conclusion that retirement of aging resources or fuel supply issues are jeopardizing electric system reliability, and, to the contrary, clean energy resources and new technologies, coupled with market mechanisms, can serve future needs. *See* pp. 20-43.
- Last, the Proposal will pose unnecessary and unacceptable risks of harm to the States and their residents. The Proposal would drive up ratepayer costs; thwart state energy policies that support competition, innovation, and reduced air pollution; and impede state progress in addressing the risks of climate change. *See* pp. 43-52.

DETAILED COMMENTS

I. Finalizing the Proposal Would Violate the Federal Power Act.

The Federal Power Act requires that “[a]ll rates and charges . . . by any public utility for or in connection with the transmission or sale of electric energy . . . and all rules and regulations

affecting or pertaining to such rates or charges” must be “just and reasonable” and not “undu[ly] preferen[tial].” 16 U.S.C. § 824d(a), (b).³ Where, as here, the Commission is considering imposing new tariff requirements on public utilities, the Commission must invoke section 206 and prove that existing rates are “unjust, unreasonable, unduly discriminatory or preferential,” and then “determine the just and reasonable rate.” 16 U.S.C. § 824e(a); *see* 16 U.S.C. § 824e(b); *Advanced Energy Mgmt. Alliance v. FERC*, 860 F.3d 656, 662–63 (D.C. Cir. 2017) (under section 206, Commission has “burden to prove the reasonableness of its change” in affirming Commission’s section 206 finding in *PJM Interconnection, LLC*, 151 FERC ¶ 61,208, *order on reh’g*, 155 FERC ¶ 61,157 (2016) (internal quotation omitted)). As the D.C. Circuit has ruled, the Commission “may unilaterally impose a new rate scheme on a utility or Regional Transmission Organization only under [section 206],” *NRG Power Mktg., LLC v. FERC*, 862 F.3d 108, 114 n.2 (D.C. Cir. 2017), and “it will ordinarily be an abuse of the Commission’s discretion not to make the . . . finding [that existing rates are unjust or unreasonable under section 206] explicit.” *Papago Tribal Util. Auth. v. FERC*, 723 F.2d 950, 958 (D.C. Cir. 1983) (Scalia, J.); *see also Maine v. FERC*, 854 F.3d 9, 24-25 (D.C. Cir. 2017) (discussing the Commission’s burden under section 206).

The Proposal wholly fails to meet the section 206 standard for Commission action. Most glaringly, it does not articulate any finding that wholesale rates are now unjust, unreasonable, or unduly discriminatory or preferential. Instead it confirms that rates are, consistent with recent

³ The Proposal states that the Commission’s authority to adopt the proposed regulations arises from sections 205 and 206 of the Federal Power Act, 16 U.S.C. §§ 824d, 824e. Proposal at 46,941. Section 205, however, applies to Commission evaluation of rate filings by public utilities, such as market rule changes proposed in the first instance by RTOs, and the Commission plays “an essentially passive and reactive role” in making decisions under that section. *NRG Power Mktg., LLC v. FERC*, 862 F.3d 108, 115 (D.C. Cir. 2017) (quoting *City of Winnfield v. FERC*, 744 F.2d 871, 875-76 (D.C. Cir. 1984)).

Commission determinations on RTO market rules, currently just and reasonable. Proposal at 46,946 (“implementation of these reforms is important to ensure rates *remain* just and reasonable” (emphasis added)). As a matter of law, therefore, in light of the Proposal’s recognition that rates currently are just and reasonable, the Commission may not impose any new tariff requirements, since it cannot satisfy its section 206 burden.

In place of a section 206 finding, the Proposal rests on allegations of supposed “threats to grid reliability and resilience” from the “continued loss of fuel-secure generation [resources],” which the Proposal says are “necessary to maintain the resiliency of the electric grid.” Proposal at 46,945. Yet the term “resilience” and its sister terms “resiliency” and “fuel secur[ity]” have no clear definition in the Proposal or in law. *See infra* note 8. And even the term “reliability” provides no stand-alone support for taking action because, “when [the Commission] chooses to refer to non-cost factors in rate setting [under the Federal Power Act], it must . . . offer a reasoned explanation of how the [relevant] factor[s] justif[y] the resulting rates.” *TransCanada Power Mktg. Ltd. v. FERC*, 811 F.3d 1, 13 (D.C. Cir. 2015) (quoting *Farmers Union Cent. Exch., Inc. v. FERC*, 734 F.2d 1486, 1502 (D.C. Cir. 1984)).⁴ Because the Proposal fails to set forth any specific section 206 findings demonstrating why current wholesale rates are unjust and unreasonable as they relate to electric grid reliability and “resilience,” the Proposal does not satisfy the requirements of the Federal Power Act and should be rejected on that basis.

Likewise, the very purpose of the Proposal is to impose additional costs on RTOs and the load they serve, yet it makes *no* attempt to address, analyze, characterize, or quantify those

⁴ *See also PJM Interconnection*, 155 FERC ¶ 61,157, 2016 WL 2752930, at *94 (Chairman Bay, dissenting) (“talismanic invocation of reliability is, by itself, inadequate to establish reasoned decision making and just and reasonable rates”).

costs.⁵ Without that information, the Commission cannot make an informed decision that rates resulting from the Proposal will be just and reasonable, as the Federal Power Act requires. *See, e.g., TransCanada Power Mktg.*, 811 F.3d at 11 (without information about portion of reliability program’s costs attributable to profits and risk premiums, Commission “could not properly assess whether the Program’s rates were just and reasonable”); *cf. Michigan v. EPA*, 135 S. Ct. 2699, 2707 (2015) (“Consideration of cost reflects the understanding that reasonable regulation ordinarily requires paying attention to the advantages *and* the disadvantages of agency decisions.”).

Not only does the Proposal fail to provide any lawful basis for imposing new tariffs, it also appears to be inconsistent with the requirements of other Federal Power Act standards. Because the Proposal presents the potential for favored resources to receive the windfall of “full” cost-of-service treatment for energy, capacity, and ancillary services that the markets could procure at a lower cost, the Proposal could result in “excessive prices” to the detriment of consumers, in violation of the “just and reasonable” standard and the purposes of the Federal Power Act. *FERC v. Elec. Power Supply Ass’n*, 136 S. Ct. 760, 781 (2016) (“The statute aims to protect ‘against excessive prices’” (quoting *Penn. Water & Power Co. v. FPC*, 343 U.S. 414, 418 (1952).)); *TransCanada Power Mktg.*, 811 F.3d at 12 (statute forbids “excessive profits”); *Pub. Sys. v. FERC*, 606 F.2d 973, 979 n.27 (D.C. Cir. 1979) (Federal Power Act “aim[s] to protect consumers from exorbitant prices and unfair business practices,” as reflected in “statutory

⁵ In recent Congressional testimony, Secretary Perry failed to respond to the question whether DOE analyzed the costs of the Proposal and stated that “[T]he cost effective argument on this is secondary to whether the lights are going to come on I think you take costs into account, but what’s the cost of freedom? . . . What is the cost to build a system to keep America free?” Gavin Bade, *Perry on DOE NOPR pricetag: ‘What’s the cost of freedom?’*, Utility Dive (Oct. 12, 2017), at <http://www.utilitydive.com/news/perry-on-doe-nopr-pricetag-whats-the-cost-of-freedom/507174/>.

requirement that rates be just, reasonable, and nondiscriminatory”). In addition, the Proposal would violate the Federal Power Act to the extent that it would have FERC unduly discriminate in wholesale ratemaking by arbitrarily favoring coal and nuclear power plants over other resources that could provide similar or superior system services or attributes at a lower cost. *See, e.g., Elec. Consumers Res. Council v. FERC*, 747 F.2d 1511, 1515 (D.C. Cir. 1984) (rates must “be non-discriminatory and non-preferential[,] as well as just and reasonable”).

II. The Proposal Violates the Commission’s Legal Rulemaking Obligations.

The Proposal is not lawful rulemaking. In both its content and in the expedited comment process the Commission is following to consider it, the Proposal is not designed to provide the “reasoned decision-making” required in the Federal Power Act context. The Proposal reflects no effort to gather a record of material facts, and therefore the Commission is compromised in its duty to “weigh[] competing views, select[] a compensation formula with adequate support in the record, and intelligibly explain[] the reasons for making [its] choice.” *Elec. Power Supply Ass’n*, 136 S. Ct. 784; *see also Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (agency must “articulate a satisfactory explanation for its action[,] including a ‘rational connection between the facts found and the choice made’” (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962))).

The Proposal lacks the substantive content or supporting factual record that would permit informed and responsive comments from the public. Moreover, the short period afforded for public comment on a regulatory change of such significant consequence as the Proposal allows insufficient time meaningfully to respond to Commission staff’s voluminous questions.⁶ More

⁶ A recent Commission rulemaking on a much narrower topic provided a combined 141 days for comments from the publication of three requests for comments in the Federal Register, with additional days between issuance of the Commission requests and Federal Register publication.

fundamentally, the Proposal does not recognize or explain the profound changes its proposed tariff requirements would make in the Commission's approach to establishing just and reasonable rates, regulating the wholesale electric market, or the potentially significant impact on consumers. For these reasons, the Proposal should go no further.

A. The Proposal Lacks a Factual and Evidentiary Basis, and Adopting It Would Therefore Be Arbitrary and Capricious.

A threshold problem with the Proposal is that it has virtually no supporting factual record of its own. The Proposal is accompanied on the docket by a letter from DOE Secretary Rick Perry, a list of questions from Commission staff, and no other supporting information. While the preamble collects a variety of excerpts from official and other technical reports and from past and ongoing Commission proceedings, none of those references supports the statements in the preamble that allege the Proposal is necessary. In particular, there is no evidentiary support in the references for the Proposal's central premise: that the "premature" retirement of certain "fuel-secure" power plants, coupled with other generators' lack of a 90-day fuel supply, is harming electric system reliability or "resilience" and threatening national security. In fact, existing evidence contradicts this assumption, as discussed in more detail in Sections III through V below.

Although the Proposal purports to rely on the "extensive record" that the Commission and other agencies have developed on the subject matter, Proposal at 46,941, it includes no direct

See Essential Reliability Servs. & the Evolving Bulk-Power Sys. – Primary Frequency Response, Notice of Inquiry, 154 FERC ¶ 61,117 (Feb. 18, 2016) (60 days from Federal Register publication to provide comments, including responses to Commission questions); Notice of Proposed Rulemaking, 157 FERC ¶ 61,122 (Nov. 17, 2016) (60 days from Federal Register publication); Notice of Request for Supplemental Comments, 160 FERC ¶ 61,011 (Aug. 18, 2017) (21 days from Federal Register publication); *see also Winter 2013-2014 Operations & Mkt. Performance in Reg'l Transmission Orgs. & Indep. Sys. Operators*, 149 FERC ¶ 61,145 (Nov. 20, 2014) (90 days for RTO responses to questions).

explanation of what evidence in that record supports the need for the Proposal. For example, the Proposal quotes DOE's January 2017 Quadrennial Energy Review ("January 2017 QER")⁷, including an italicized statement that "the increased importance of system resilience to overall grid reliability *may* require adjustments to market mechanisms that enable better valuation." Proposal at 46,943 (emphasis added). This general statement does not reference any emergency, crisis, or actual need to make significant market changes, nor does it identify fuel security as a key element of "resilience."⁸ The January 2017 QER includes extensive recommendations to address electric system resilience, none of which includes establishing cost-of-service rates for the resources identified in the Proposal. *See, e.g.*, January 2017 QER at 4-1 to 4-55 (no mention of "fuel security").

The Proposal then quotes a May 2017 letter to DOE from the North American Electric Reliability Corporation ("NERC") stating that the changing operating characteristics of the bulk power system "must be well understood and properly managed." That letter does not appear in this rulemaking docket, but is available online.⁹ While the NERC letter identifies retirement of certain generating assets as implicating reliability, it *does not* recommend assuring cost recovery for the resources identified in the Proposal. Instead, the letter requests that the Commission and states conduct a *review* of the economic and policy issues related to retirements. The Proposal

⁷ U.S. Department of Energy, Quadrennial Energy Review – Transforming the Nation's Electricity System: The Second Installment of the QER (Jan. 2017), *available at* <https://energy.gov/sites/prod/files/2017/02/f34/Quadrennial%20Energy%20Review--Second%20Installment%20%28Full%20Report%29.pdf> ("January 2017 QER").

⁸ The January 2017 QER states that "[t]here are no commonly used metrics for measuring grid resilience." January 2017 QER at S-13. In other words, there currently is no quantifiable standard by which to determine either the qualities or the services that will be rewarded under the Proposal by full cost-of-service rates for the Proposal's favored resources.

⁹ *At* https://www.eenews.net/assets/2017/10/03/document_ew_01.pdf.

then makes similar unfounded analytical leaps from DOE's own August 2017 Staff Report¹⁰ to the conclusion that there is a "resiliency" emergency, which will be addressed in more detail below.

Finally, the Proposal includes a description of various Commission proceedings concerning reliability and price formation in wholesale markets dating to 2013. Despite this long record of Commission action, including various orders to strengthen the markets and set "just and reasonable" rates for RTOs and other market participants, the Proposal nonetheless concludes that the very reliability-related market issues the Commission has been addressing in the cited dockets are not being addressed adequately. Without citation or authority, the Proposal states that certain market deficiencies are "undermining reliability and resiliency," Proposal at 46,944, that "the fundamental challenge of maintaining a resilient electric grid has not been sufficiently addressed by the Commission or the ISOs and RTOs," and the "continued loss of fuel-secure generation must be stopped," Proposal at 46,945. Importantly, this unsupported rationale is contradicted by DOE's own findings as set forth in its August 2017 Staff Report, which concluded that wholesale electric markets "are currently functioning as designed—to ensure reliability and minimize the short term costs of wholesale electricity—despite pressures from flat demand growth, Federal and state policy interventions, and the massive economic shift in the relative economics of natural gas compared to other fuels." DOE Staff Report at 10. Moreover, nowhere in that report does DOE recommend, or even identify as an option,

¹⁰ Department of Energy, Staff Report to the Secretary on Electricity Markets and Reliability (Aug. 2017), *available at* https://energy.gov/sites/prod/files/2017/08/f36/Staff%20Report%20on%20Electricity%20Markets%20and%20Reliability_0.pdf ("DOE Staff Report").

subsidizing the generation identified in the Proposal through a federal guarantee of full cost recovery. *See id.* at 126-27.

The lack of factual support for the Proposal extends to the details of its proposed tariffs, including their applicability solely in regions within a Commission-approved ISO or RTO with a day-ahead market, real-time market, and capacity market,¹¹ its 90-day fuel requirement for eligible resources, and its exclusion of resources subject to cost-of-service regulation by states. *See* Proposal at 46,948. Cost-of-service ratemaking, ordinarily reserved for monopoly services, involves specific accounting rules, including specifying the sources of data, accounting for taxes, the treatment of transaction-related costs, asset retirement, lobbying and advertising expenses, and allocation of costs among jurisdictions and functions.¹² The Proposal contains no discussion of, or support for, the inclusion of any of these specific provisions.

In sum, the preamble to the Proposal and the references that it cites include no factual support for the Proposal in general and lack support for its specific provisions to implement cost-of-service ratemaking. These blatant defects make any effort to finalize the Proposal arbitrary and capricious and thus violate the requirements for Commission decision-making under the Federal Power Act, the Administrative Procedure Act, and governing case law. *See Elec. Power Supply Ass'n*, 136 S. Ct. at 784; *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43.

¹¹ The versions of the Proposal attached to Secretary Perry's letter to the Commission and posted in this rulemaking docket do not contain this last limitation, but the version published in the Federal Register does. *See* 82 Fed. Reg. 46,940, 46,948 (Oct. 10, 2017). According to an errata notice, the Commission is seeking comment on the version in the Federal Register.

¹² *See, e.g.*, Commission Staff's Guidance on Formula Rate Updates (2014), *available at* <https://www.ferc.gov/industries/electric/indus-act/oatt-reform/staff-guidance.pdf>; *see also, e.g.*, PJM Interconnection, PJM Open Access Transmission Tariff, Docket No. ER17-2232-000, at 1580-1608, *available at* <http://www.pjm.com/directory/merged-tariffs/oatt.pdf> (annual transmission rates for Commonwealth Edison Company Network Integration Transmission Service).

B. The Proposal Is Fatally Lacking in the Meaningful Detail Necessary for Public Notice and Informed Public Comments.

The Proposal seeks to remake the wholesale electric markets to assure that certain resources fully recover from ratepayers their costs and guaranteed returns on their investments, despite the fact that those resources are no longer economically competitive. But the Proposal gives only the most generic guidance on how that recovery should occur and on what terms. Indeed, the proposed regulatory language is less than one page and provides no definitions of key terms like “resiliency,” “emergency,” “90-day fuel supply,” “fuel-assurance,” or “fully allocated costs and a fair return on equity.” *See* Proposal at 46,948. The preamble states the Proposal’s “crisis” rationale in conclusory fashion, without any record citations or evidence to indicate that the proposed action is necessary. *See* Proposal at 46,941-42.

This is not fair public notice. The Proposal is deficient on its face for failing to “provide sufficient factual detail and rationale for the rule to permit interested parties to comment meaningfully.” *Am. Water Works Ass’n v. EPA*, 40 F.3d 1266, 1274 (D.C. Cir. 1994) (citation omitted). Further, it would be improper for the Commission to develop a *post-hoc* rationale for the Proposal through assembly of a record during the comment period or thereafter; the rulemaking proposal itself must provide notice of the *agency’s* rationale and record support. *See* Hon. Harry T. Edwards et al., *Federal Standards of Review: Review of District Court Decisions and Agency Actions* ch. XIII.E (2013) (citing *Ass’n of Private Sector Colls. & Univs. v. Duncan*, 681 F.3d 427, 462 (D.C. Cir. 2012)); *Chamber of Commerce v. SEC*, 443 F.3d 890, 900 (D.C. Cir. 2006) (“By requiring the ‘most critical factual material’ used by the agency be subjected to informed comment, the [Administrative Procedure Act] provides a procedural device to ensure that agency regulations are tested through exposure to public comment, to afford affected parties an opportunity to present comment and evidence to support their positions, and thereby to

enhance the quality of judicial review.”). In this case, DOE drafted the Proposal, and the Proposal’s deficiencies are attributable to DOE. It is the Commission’s duty to decline to proceed with such a sweeping rulemaking on notice that is so deficient and vague.

C. Both DOE’s Directives and the Commission’s Timeline for Considering the Proposal Prevent Participants from Commenting Fully on the Many Complex Issues Raised by the Proposal.

The deadline for initial comments on the Proposal is set for 21 days following the Commission’s public notice, 19 days after Commission staff posted a detailed list of thirty questions about the Proposal, and a mere 12 days following the publication of the Proposal in the Federal Register, with reply comments due only 14 days later. This timeline closes the comment period on the Proposal in less than the 30-day post-publication period that is typically the bare minimum afforded for federal rulemaking, and far less than the 90 to 180 day comment periods, often preceded by Advance Notices of Proposed Rulemaking and their own comment periods, that major rulemaking proposals often require.¹³ The Commission’s denial of the many requests for an extension of the comment period, without supporting reasons, has compounded the prejudice to commenters. Moreover, given the vast volume of public comments expected on the Proposal, the Commission should allow more than a mere 14 days to file comments replying to the expected deluge of initial comments.

In this regard, DOE’s directive to take final action on the Proposal within 60 days also

¹³ See *supra* note 6; cf. Executive Order No. 12,866, 58 Fed. Reg. 51,735, § 6(a) (1993) (“[E]ach agency should afford the public a meaningful opportunity to comment on any proposed regulation, which in most cases should include a comment period of not less than 60 days.”); Office of the Federal Register, A Guide to the Rulemaking Process (2011), at https://www.federalregister.gov/uploads/2011/01/the_rulemaking_process.pdf (“In general, agencies will specify a comment period ranging from 30 to 60 days. . . For complex rulemakings, agencies may provide for longer time periods, such as 180 days or more.”).

improperly impinges on the Commission's responsibility to act in a deliberative and independent manner in accordance with the Department of Energy Organization Act. *See, e.g.*, 42 U.S.C. § 7173(b) (Commission has "exclusive jurisdiction" with respect to any proposal and shall act within "reasonable time limits"); *id.* § 7173(c) (Commission's use of rulemaking procedures to set rates under Federal Power Act procedures "shall assure full consideration of the issues and an opportunity for interested persons to present their views"); *id.* § 7171(d) ("In the performance of their functions, the members, employees or other personnel of the Commission shall not be responsible to or subject to the supervision or direction of any officer, employee or agent of any other part of" DOE.).

D. The Proposal Fails to Articulate a Reasoned Basis for Its Sweeping Changes to the Country's Electricity Markets.

In guaranteeing "full" cost recovery for a group of preferred resources, regardless of market outcomes, the Proposal would decisively break from the Commission's longstanding reliance on competitive wholesale markets to secure just and reasonable rates. As the Supreme Court has recently recognized, the Commission "undertakes to ensure 'just and reasonable' wholesale rates by enhancing competition—attempting . . . 'to break down regulatory and economic barriers that hinder a free market in wholesale electricity.'" *Elec. Power Supply Ass'n*, 136 S. Ct. at 768 (quoting *Morgan Stanley Capital Grp. v. Pub. Util. Dist. No. 1 of Snohomish Cnty.*, 554 U.S. 527, 536 (2008)); *see also* *Midwest Indep. Transmission Sys. Operator, Inc.*, 108 FERC ¶ 61,163 at P 371 n. 226 (2004) ("The Commission favors market design remedies, where possible, to provide needed revenues to support reliability-based generators and other needed investments.").

The Proposal contravenes decades of Commission precedent establishing and strengthening competition in the country's wholesale electric markets. Pursuant to Order 888, the

Commission required open access to transmission services, the foundation necessary for competitive wholesale electric markets in the United States. Order No. 888, *Promoting Wholesale Competition Through Open-Access Non-discriminatory Transmission Servs. by Pub. Utils.*, 61 Fed. Reg. 21,540 (May 10, 1996), *aff'd in part, rev'd in part*, 225 F. 3d. 667 (D.C. Cir. 2000), *aff'd sub nom. New York v. FERC*, 535 U.S. 1 (2002). Prior to the Commission's restructuring of the market under Order 888 and its successors, electricity delivery and supply were treated as monopoly services.¹⁴ Rates were based on cost-of-service rate-of-return ratemaking, which in some cases resulted in inefficient investment decisions and excessive costs.¹⁵ There was little competition among generators and no market discipline brought to bear on a generator's prices or costs. In many cases, ratepayers were saddled with the full costs of expensive and often over-budget power plants, and bore the downside risks that vertically integrated utilities incurred. See National Renewable Energy Laboratory, *Competitive Electricity Market Regulation in the United States: A Primer* at 9 (2016), at <https://www.nrel.gov/docs/fy17osti/67106.pdf> (hereinafter, "Competitive Electricity Market Regulation") (citing utility "overbuilding of [generation] capacity and the concomitant capital costs, [which] triggered rate increases," "utility mismanagement," and "lax regulatory oversight").¹⁶

¹⁴ In many states, electricity delivery and supply remain bundled and subject to cost-of-service regulation. However, the Proposal would exclude those resources from the rule. Proposal at 46,948, proposed rule § 35.28(g)(10)(i)(E).

¹⁵ The seminal work addressing the perverse incentives favoring inefficient investment ("gold-plating") as a result of cost-of-service regulation is the paper by Harvey Averch and Leland L. Johnson, *Behavior of the Firm Under Regulatory Constraint*, AM. ECON. REV., Vol. 52, No. 5, pp. 1052-1069 (Dec. 1962). The "Averch-Johnson" effect has been widely discussed in regulatory decisions at both the state and federal levels.

¹⁶ These features are not inevitable results of cost-of-service regulation of utility assets within the context of least-cost integrated resource planning and careful review of regulated utilities and

In issuing Order 888, the Commission's express goal was "to ensure that customers have the benefits of competitively priced generation." 61 Fed. Reg. at 21,550. Since its initial issuance of Order 888, the Commission has not wavered from its commitment to open wholesale electric markets and "the promise of an increasingly competitive commodity market in electric power, in which significant benefits to consumers can be achieved." *Id.* at 21,569. Many states, including certain states represented by the State Commenters, amended their state laws to replace the pricing of electricity through regulation with reliance on Commission-regulated wholesale electric markets to set the price of electricity.¹⁷

As part of the its implementation of competitive wholesale electric markets, the Commission consistently has promoted greater competition to benefit electric customers and, among other reforms, strongly has encouraged the organization of regional markets administered by independent system operators, which now serve two-thirds of the nation's electric customers. *See* Competitive Electricity Market Regulation at 9; *see also* Order No. 2000, *Regional Transmission Orgs.*, 89 FERC ¶ 61,285 (Dec. 20, 1999).¹⁸ According to the Commission, "[e]ffective wholesale competition protects consumers by providing more supply options, encouraging new entry and innovation, spurring deployment of new technologies, promoting

their costs by utility commissions, as evidenced by the successful regulatory regimes that govern transmission at the federal level and distribution (and in some states, generation) at the state level. The success of state regulation depends on the application of appropriate rules and fair procedures to govern the establishment of rates.

¹⁷ In the PJM region, for example, the price for electricity rose in the 2000s and began to fall in 2009 as new technologies developed and competition imposed discipline on market participants. *See* Monitoring Analytics LLC, State of the Market Report for PJM, Vol. 1, at 17, Table 9 (Mar. 2017), available at http://www.monitoringanalytics.com/reports/PJM_State_of_the_Market/2016/2016-som-pjm-volume1.pdf.

¹⁸ *Order on reh'g*, Order No. 2000-A, 65 Fed. Reg. 810 (2000), *aff'd sub nom. Pub. Util. Dist. No. 1 of Snohomish Cnty. v. FERC*, 272 F.3d 607 (D.C. Cir. 2001).

demand response and energy efficiency, improving operating performance, exerting downward pressure on costs, and shifting risk away from consumers.” Order No. 719, *Wholesale Competition in Regions with Organized Elec. Mkts.*, 125 FERC ¶ 61,071 at P 1 (Oct. 17, 2008); *see also Midwest Indep. Transmission Sys. Operator, Inc.*, 108 FERC ¶ 61,163 at P 371 n.226 (“The Commission favors market design remedies, where possible, to provide needed revenues to support reliability-based generators and other needed investments.”). As a matter of Commission precedent, “[i]mproving the competitiveness of organized wholesale energy markets is therefore integral to the Commission fulfilling its statutory mandate to ensure supplies of electric energy at just, reasonable, and not unduly discriminatory or preferential rates.” Order No. 719 at P 1.

The Proposal turns this principle on its head by guaranteeing “full” cost recovery for certain preferred generation resources. *See* Proposal at 46,945 (“The rule allows the full recovery of costs of certain eligible units physically located within the Commission-approved organized markets [and] requires the organized markets to establish just and reasonable rate tariffs for the recovery of costs and a fair rate of return.”). Because those resources, unlike their competitors, would no longer need to recover their costs in the market, giving them “full” federally-guaranteed cost recovery would be a significant departure from the Commission’s policy of promoting competitive, fuel-neutral, non-discriminatory, and efficient wholesale markets. It could be justified, as part of the Commission’s statutory responsibilities, only, if ever, upon a clear showing of necessity to ensure electric system reliability. That showing has not been

made.¹⁹ Instead, electric customers would invariably have to pay those costs, regardless of how high they are, and customers will bear the investment risks now borne by resource owners.

The Proposal is profoundly different from state credit-based programs that incentivize utilities' procurement of particular resources. Those state programs neither guarantee full cost recovery, nor remove categories of resources from the competitive wholesale market. Rather, those programs are one means by which states exercise their traditional authority to regulate electric generation. *See* Section VI.B, *supra*.

As the Proposal is unmoored from specific and demonstrable reliability concerns or other legal authority, its preferential treatment of uncompetitive resources would also depart from the Commission's statutory obligation and longstanding position that wholesale electric markets should ensure an open and level playing field for generating and other resources. 16 U.S.C. §§ 824d(a), (b); *see, e.g., Indianapolis Power & Light Co.*, 158 FERC ¶ 61,107 at P 69 (2017) (market rules that "unnecessarily restrict[] competition" by excluding certain resources are "unjust, unreasonable, and unduly discriminatory or preferential"); Order No. 745, *Demand Response Compensation in Organized Wholesale Energy Markets*, 134 FERC ¶ 61,187 at P 59

¹⁹ The nation's RTOs are committed to preserving and strengthening competitive electric markets that ensure reliability. In the wake of the Proposal, this view was reaffirmed by ISO New England ("ISO-NE"), which has overseen and successfully managed substantial retirements of coal and nuclear resources in recent years. *See* Notice, ISO-NE, *Study on Regional Fuel Security to be Delayed Pending Resolution of DOE Proposal on Grid Resiliency Pricing* at 1 (Oct. 13, 2017), available at https://www.iso-ne.com/static-assets/documents/2017/10/20171013_fuel_security_analysis_delay_final.pdf ("ISO-NE Delay Notice") ("Competitive markets have worked effectively in New England to bring forward the resources needed to ensure reliable power system operations while reducing power system emissions and wholesale power prices. Reliability services can be provided by a wide range of resources and technologies, including those that have onsite fuel, and the ISO believes that the most efficient solution is to procure those services through a competitive market whenever feasible. Providing full cost recovery for certain technologies and not others will ultimately undermine the competitive wholesale market construct and lead to cost-of-service for all resources.").

(2011) (“removing barriers to demand response participation” in markets “facilitates greater competition”).²⁰

Such an irrational and unexplained departure from the Commission’s precedents would be unlawful. Under the Administrative Procedure Act, when an agency reverses existing policy, it must show a change in circumstances and policy and provide strong reasons for disregarding prior factual and policy conclusions. As the D.C. Circuit has recently explained, when reversing existing policy:

[T]he Supreme Court has held that “the [Administrative Procedure Act] requires an agency to provide more substantial justification when its new policy rests upon factual findings that contradict those which underlay its prior policy; or when its prior policy has engendered serious reliance interests that must be taken into account.” . . . “It is not that further justification is demanded by the mere fact of policy change[,] but that a reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy.” . . . “Put another way, ‘it would be arbitrary and capricious to ignore such matters.’”

U.S. Telecom Ass’n v. FCC, 825 F.3d 674, 708-09 (D.C. Cir. 2016) (citing *Elec. Power Supply Ass’n*, 136 S. Ct. at 784), *reh’g denied*, 855 F.3d 381 (D.C. Cir. 2017), *petitions for cert. filed* (U.S. Sept. 27, 2017) (No. 17-498 et al.); *see also* 5 U.S.C. § 706; *La. Pub. Serv. Comm’n v. FERC*, 184 F.3d 892, 894, 897 (D.C. Cir. 1999) (“arbitrary and capricious” for Commission to “without an explanation . . . depart[] from its own precedent” (citing *Motor Vehicle Mfrs. Ass’n*, 463 U.S. at 57)); *Mich. Pub. Power Agency v. FERC*, 405 F.3d 8, 16 (D.C. Cir. 2005) (remanding for further explanation where Commission failed to adequately explain new

²⁰ *Order on reh’g*, Order No. 745-A, 137 FERC ¶ 61,215 (2011), *reh’g denied*, Order No. 745-B, 138 FERC ¶ 61,148 (2012), *vacated sub nom. Elec. Power Supply Ass’n v. FERC*, 753 F.3d 216 (D.C. Cir. 2014), *rev’d & remanded sub nom. FERC v. Elec. Power Supply Ass’n*, 136 S. Ct. 760 (2016).

policy). The Proposal thus fails to address factual or policy changes that would justify a radical shift away from market pricing, does not recognize the consequences to parties that have placed “serious reliance” upon the wholesale market rules, and fails to meet the standard for reversing existing Commission policy.

III. The Proposal Is Unnecessary to Support System Reliability.

On its own terms, the Proposal is a solution for a problem that does not exist. First and foremost, there is no evidence that electric system reliability is in any present danger. As discussed below, DOE’s own staff report confirmed this reality earlier this year, *see* DOE Staff Report at 10 & *infra* Section IV.B, as did Commission staff in an October 19, 2017 report to the Commission providing its assessment of energy market conditions during the upcoming winter.²¹

Nor do the ongoing retirements of resources with on-site fuel present an emergency requiring immediate out-of-market Commission actions. With the Commission’s approval, numerous regional markets operate capacity and other markets to ensure that they have adequate generation resources to meet peak customer demand plus a reserve margin, and thus ensure system reliability over time. FERC Staff Report No. AD13-7-000, *Centralized Capacity Mkt. Design Elements*, at 2 (Aug. 2013), at <http://www.ferc.gov/CalendarFiles/20130826142258-Staff%20Paper.pdf> (“[T]he primary goal of each of these markets is the same: ensure resource adequacy at just and reasonable rates through a market-based mechanism that is not unduly discriminatory or preferential as to the procurement of resources.”). The capacity markets provide additional payments to generators and other resources to supplement energy revenues, in recognition of the fact that energy revenues alone may not be sufficient for some generators to

²¹ FERC Staff, Winter 2017-18 Energy Market Assessment (Oct. 19, 2017), *available at* <https://www.ferc.gov/market-oversight/reports-analyses/mkt-views/2017/10-19-17-A-3.pdf> (“Winter Energy Market Assessment”).

recover their costs and remain viable. *Id.* The Commission has reviewed the capacity market rules regularly in response to complaints and tariff filings, and, in recent years the Commission has approved modifications to capacity markets so that they compensate capacity based on availability and performance at times of high demand. *See, e.g., PJM Interconnection*, 155 FERC ¶ 61,157 at P 29 (Tying “resource compensation to a resource’s actual performance, is consistent with fundamental principles of fairness. Resources should be compensated in proportion to their performance.”).

The Proposal applies only to the RTOs that have established these capacity markets, apparently amounting to a judgment that those markets have wholly failed to meet their objectives and should be scrapped. Proposal at 46,948. To the contrary, these capacity markets are successful in procuring needed capacity to ensure system reliability in the regions where they operate.²²

- In 2016, ISO New England’s (“ISO-NE”) tenth annual capacity auction included stringent requirements to ensure resource performance at times of system stress, concluded at lower price than the previous auction, and procured sufficient resources, including three new conventional power plants, as well as capacity from solar and offshore and onshore wind facilities, to meet projected New England demand in 2019-2020.²³
- In PJM Interconnection’s (“PJM”) most recent capacity auction held in May 2017 and applicable in 2020-2021, the reserve margin for the entire RTO was 23.3%, that is, 6.7% higher than the target reserve margin of 16.6%. In other words, existing PJM resources exceed peak demand by 23.3%, demonstrating that there is sufficient reliable generation available to serve all customers in the PJM region. Moreover, in PJM capacity auctions covering 2017/2018 through 2020/2021, new generation and generation uprates (increased capacity) ranging from 2,823.8 megawatts (“MW”) to 6,267.3 MW cleared the auction. PJM further reports that

²² For information on capacity markets not discussed here, see the comments filed in this docket by certain State Commenters’ respective state utilities regulators.

²³ Press Release, ISO-NE, *Finalized Capacity Auction Results Confirm 10th FCA Procured Sufficient Resources, at a Lower Price, for 2019–2020* (Feb. 29, 2016), at https://www.iso-ne.com/static-assets/documents/2016/02/20160229_fca10_finalresults.pdf.

from 2007/2008 to 2020/2021, the net increase in installed capacity, including generation retirements and additions, demand response, and energy efficiency, equals 22,701 MW in the PJM region.²⁴

- In the Midcontinent Independent System Operator (“MISO”) region, the most recent offers of capacity exceeded the reserve margin by 5.5%, resulting in a region-wide price of \$1.50 per MW-day, reflecting the existence of more than sufficient generation resources to meet regional demand.²⁵

The fact that certain older, uneconomic resources do not clear the auctions and are retiring is not evidence that capacity markets are failing; to the contrary, these markets have ensured replacement of retiring resources with new capacity in a manner that has met regional installed capacity and reserve requirements and maintained system reliability.²⁶ Against this backdrop, there is no need for the Proposal, or anything similar, to safeguard system reliability.²⁷

²⁴ PJM, *2020/2021 RPM Base Residual Auction Results* at 2-3, 19 (2017), available at <http://www.pjm.com/~media/markets-ops/rpm/rpm-auction-info/2020-2021-base-residual-auction-report.ashx>.

²⁵ MISO, *2017/2018 Planning Resource Auction Results* at 5 (2017), available at <https://www.misoenergy.org/Library/Repository/Meeting%20Material/Stakeholder/RASC/2017/20170510/20170510%20RASC%20Item%2002a%202017-18%20PRA%20Summary.pdf>.

²⁶ See, e.g., *ISO New England Inc. and New England Power Pool Participants Comm.*, 158 FERC ¶ 61,138, at P 9 (2017) (“One purpose of capacity markets is to send appropriate price signals regarding where and when new resources are needed.”); *Long Island Power Auth. v. N.Y. Indep. Sys. Operator, Inc.*, 120 FERC ¶ 61,071, at P 14 (2007) (“the [capacity] market would benefit customers by encouraging the construction of new capacity”); *N.Y. Indep. Sys. Operator, Inc.*, 103 FERC ¶ 61,201, at P 36 (2003) (“NYISO’s analyses adequately demonstrate that the proposal will benefit customers because it will encourage the construction of new generation.”), *aff’d sub nom Elec. Conservation Res. Council v. FERC*, 407 F.3d. 1232 (2005); *ISO New England Inc.*, 148 FERC ¶ 61,201, 2014 WL 4637550, at *4 (2014) (LaFleur, concurring) (“Forward Capacity Market (FCM) plays a vital role in ensuring reliability in New England. [It] is the mechanism that ensures future system reliability by procuring capacity resources sufficient to meet New England’s resource adequacy needs.”).

²⁷ The Commission has preexisting tools to address short-term reliability issues that may arise from the retirement of a particular resource, including approval of reliability-must-run agreements with generators, which “should be of a limited duration so as to not perpetuate out-of-market solutions that have the potential, if not undertaken in an open and transparent manner, to undermine price formation” in the wholesale market. *N.Y. Indep. Sys. Operator, Inc.*, 150 F.E.R.C. ¶ 61,116 at P 2 (2015).

It is hard to envision how the Proposal could co-exist with capacity and other markets. With no incentive to recover fixed costs through markets, favored resources theoretically could recover both market and cost-based revenues, or rely exclusively on cost-based revenues and exit the market altogether, causing future auctions to fail. The Proposal would unacceptably undermine if not destroy the many years of hard work by the Commission, the RTOs, and market participants and stakeholders (including the States) to refine and adjust the capacity and other market constructs employed by the country's RTOs. The Commission should instead continue its longstanding efforts to work with RTOs and stakeholders to improve capacity and other markets.

Moreover, the Commission, the nation's RTOs, and other reliability organizations have already developed both markets and cost-based rates to compensate providers of power-related services that are necessary for reliability, such as black-start capabilities and spinning reserves. *See, e.g.,* Competitive Electricity Market Regulation at 14-15. These services have been addressed in established, deliberative processes that provide the opportunity for stakeholders, including generators, utilities, consumers, and the Commission, to participate in ensuring that the nation's electric grid meets the Commission-approved reliability standards promulgated under section 215 of the Federal Power Act, 16 U.S.C. § 824(o), which was enacted as part of the Energy Policy Act of 2005.

In contrast to the more inclusive processes approved by the Commission to address market issues, the Proposal reflects a top-down approach that departs from the decision-making process undertaken by the nation's RTOs, in collaboration with the States and other stakeholders. *See, e.g.,* Order No. 719 at P 477 (finalizing requirements for RTOs and ISOs that reaffirm importance of "responsiveness" by RTOs and ISOs, i.e., "willingness, as evidenced in its practices and procedures, to directly receive concerns and recommendations from customers and

other stakeholders, and to fully consider and take actions in response to the issues that are raised”). In the refinement of capacity markets and in many other areas, regional markets have institutionalized reliability and system planning within extensive stakeholder processes under the Commission’s oversight.²⁸

In past approaches to address the very fuel supply issues that the Proposal purportedly seeks to cure, the Commission has followed a more deliberative and bottom-up process to investigate potential market improvements. In 2016, for example, the Commission approved changes to the PJM capacity market as a part of its “broader effort, by the RTOs, market participants, and the Commission, to adapt the nation's wholesale electric markets to the underlying changes in how electricity is generated and ensure that reliability is sustained during and after that transition.” *PJM Interconnection*, 155 FERC ¶ 61,157, at P 25. The Commission stated:

[I]n recent years, the Commission has convened technical conferences specifically addressing the operation of wholesale capacity markets and the increasing importance of coordination between the electric and natural gas industries for the reliability of the nation's electricity supply. Those efforts have resulted in both regional market changes, such as ISO New England, Inc.’s Pay for Performance capacity market reforms (upon which PJM’s Capacity Performance program is modeled), and national changes to communication and coordination processes between the natural gas and electric industries.

²⁸ In general, stakeholder processes are recognized as vital contributors to the development of regional market rules. Mark James et al., *How the RTO Stakeholder Process Affects Market Efficiency*, R Street Policy Study No. 112, at 19 (October 2017), available at <http://www.rstreet.org/wp-content/uploads/2017/10/112.pdf> (“Stakeholder-governance processes are essential to the efficient development of market rules. Our research and interviews discovered a consensus that these processes are generally working well and serve the needs of the stakeholder community.”). State agencies, consumer advocates, and utility commissions generally have “seats at the table” and regularly participate in and influence these processes. *Id.* at 2, 11.

Id. See, e.g., Centralized Capacity Markets in Reg'l Transmission Organizations & Indep. Sys. Operators Winter 2013-2014 Operations & Mkt. Performance in Reg'l Transmission Orgs. & Indep. Sys. Operators, 149 FERC ¶ 61,145 at P 19 (2014) (providing “each RTO/ISO the opportunity to identify the fuel assurance issues most relevant to its markets and comprehensively describe the set of actions it has already undertaken or proposes to undertake to address these issues”).²⁹ Whether or not all stakeholders have agreed with the particular outcomes of these market initiatives, the joint efforts by RTOs, stakeholders, and the Commission to improve system reliability and market performance in the face of a changing resource mix reflect the fitness and durability of Commission oversight to address wholesale market challenges, including the alleged challenges described in the Proposal. The Proposal provides no reason for the Commission to depart from its practice of engaging market participants and other stakeholders through deliberative and inclusive inquiries that draw on

²⁹ RTOs continue to conduct analysis of these issues. ISO-NE is in the midst of completing a study regarding fuel security, and the Proposal has compelled it to indefinitely delay the study’s release and the subsequent stakeholder discussions of potential market changes to address any fuel security issues it identifies. *See* ISO-NE Delay Notice, *supra* note 19, at 2 (“The identification of appropriate market design improvements will be a complex undertaking and will require a systematic and deliberative regional process for examining the risks and potential solutions. The ISO planned to discuss the study results with stakeholders over the remainder of 2017 and into early 2018 and begin discussions of solutions after that process. The ISO’s goal has always been to work with stakeholders—market participants, regulators, policymakers, and others—to address New England’s unique fuel-security challenges through the wholesale market construct. However, the US DOE NOPR has raised the potential for significant changes to the wholesale electricity markets in the US. Therefore, the ISO has concluded that it is prudent to delay finalizing the study until the [Commission] has provided direction to the industry on how to interpret the DOE NOPR in the context of competitive wholesale markets. ISO New England intends to release the Operational Fuel-Security Analysis once the NOPR is sufficiently resolved.”).

RTO stakeholder processes that provide vital opportunities for the exchange of data and ideas prior to adopting market rule or pricing changes.³⁰

IV. The Proposal Is Contrary to the Findings of the Department of Energy Staff Report and Other Credible Analyses.

The Proposal relies heavily on the August 2017 DOE Staff Report on electric markets and reliability. *See* Proposal at 46,941. The bulk of the DOE Staff Report provides a summary of trends in the wholesale electric market, including the retirement of certain generation resources, the increasing use of low-cost natural gas, and the integration of variable energy resources like wind and solar.³¹ The report does not support the Proposal's dire characterization of the power sector, finding rather that the electric system is currently reliable. In general, the report recommends additional work on issues that the Commission is currently addressing and further study and review of electric system resilience. In sum, although the State Commenters do not necessarily endorse the findings and policy recommendations in the report, it suffices here to point out that the report does not support the Proposal's immediate and drastic regulatory intervention in the nation's wholesale markets. Moreover, other credible analysis shows that the Proposal's picture of an electric system under siege from "baseload" resource retirements,

³⁰ *See, e.g.*, PJM, Capacity Construct and Public Policy Senior Task Force, CCPPSTF Matrix (Oct. 16, 2017), *available at* <http://www.pjm.com/-/media/committees-groups/task-forces/ccppstf/20171016/20171016-ccppstf-matrix.ashx> (logging the development of interest identification, design criteria, key work activities, and capacity market rule change proposal packages relating to a two-tier capacity market to ensure adequate resources are procured by PJM's Reliability Pricing Model).

³¹ The DOE Staff Report responded to three issues posed by Secretary Perry in an April 2017 memorandum, namely, "[t]he evolution of wholesale electricity markets"; "[w]hether wholesale energy and capacity markets are adequately compensating attributes such as on-site fuel supply and other factors that strengthen grid resilience and, if not, the extent to which this could affect grid reliability and resilience in the future"; and "[t]he extent to which continued regulatory burdens, as well as mandates and tax and subsidy policies, are responsible for forcing the premature retirement of baseload power plants." DOE Staff Report at 1.

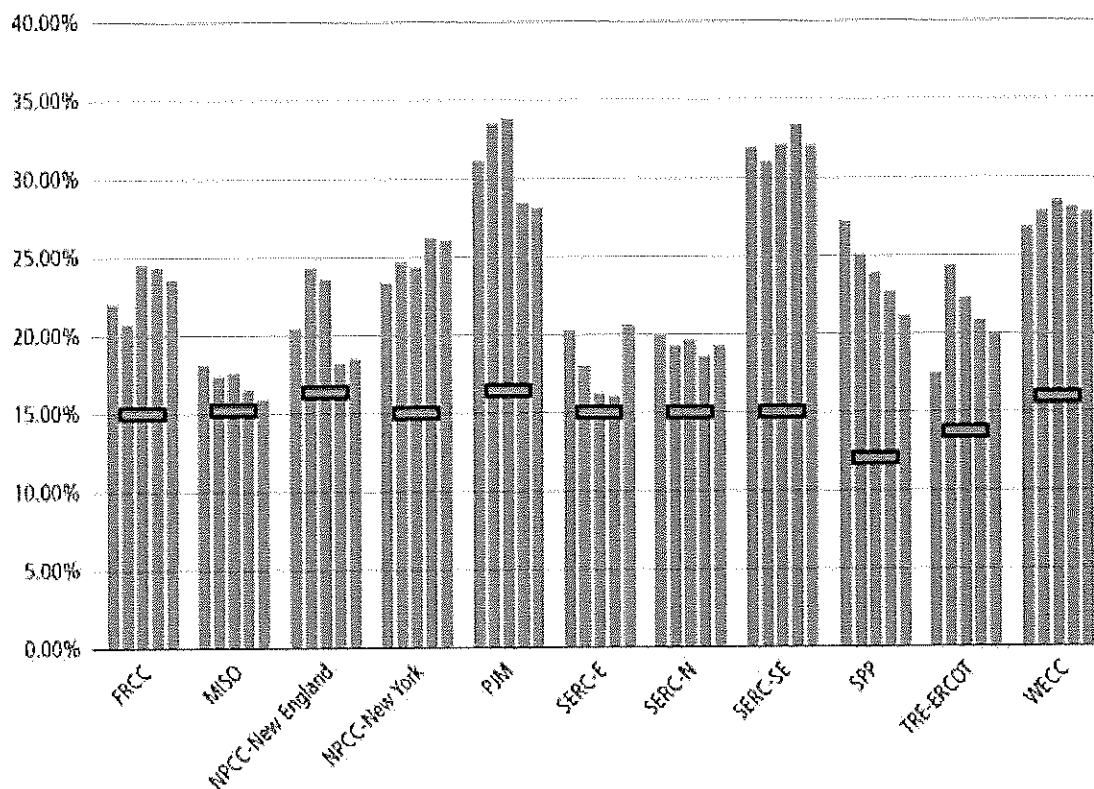
unreliable replacement resources, and extreme-weather disruptions to fuel supplies is simply not accurate.

A. The Staff Report Indicates that Electric System Reliability Is Adequate.

The DOE Staff Report expressly affirms the reality that the nation's bulk power system has successfully managed changing market conditions in recent years, including significant levels of retirements of certain resources, and is currently reliable. Specifically, the report confirms:

- “[Bulk power system] reliability is adequate despite the retirement of a portion of baseload capacity and unique regional hurdles posed by the changing resource mix.” DOE Staff Report at 11.
- “[Bulk power system] reliability is adequate today despite the retirement of 11 percent of the generating capacity available in 2002, as significant additions from natural gas, wind, and solar have come online since then. Overall, at the end of 2016, the system had more dispatchable capacity capable of operating at high utilization rates than it did in 2002.” *Id.* at 63.
- “To date, wholesale markets have withstood a number of stresses. While markets have evolved since their introduction, they are currently functioning as designed—to ensure reliability and minimize the short-term costs of wholesale electricity—despite pressures from flat demand growth, Federal and state policy interventions, and the massive economic shift in the relative economics of natural gas compared to other fuels.” *Id.* at 10.
- Over the longer term, “NERC reports that all regions project more than sufficient planning reserve margins. . . . [P]lanning reserve margins exceed their respective regional targets despite the loss of traditional baseload capacity since 2002.” *Id.* at 65. The DOE Staff Report contains a chart, *id.* at 66, showing these planning reserve margins through 2022:

Figure 4.2. Five-Year Average Reserve Margins across Different Regions (2018–2022)²³¹



The Proposal does not reference these findings, which confirm there is significant capacity above the RTO reserve margins and contradict its assertion that “immediate action is necessary” to ensure reliability. The DOE Staff Report also does not support the Proposal’s assertion that “immediate action is necessary” because further power plant retirements will cause “severe consequences,” Proposal at 46,945. *See* DOE Staff Report at 8. The report recognizes that retirements are happening, and states that “[w]hile stakeholders may maintain that a power plant has been forced to retire prematurely based on one or more of the considerations above, the results of this study show that some observed power plant retirements were appropriate and consistent with markets as they are currently functioning.” *Id.*; *see also id.* at 11 (“Markets recognize and compensate reliability, and must evolve to continue to compensate reliability, but more work is needed to address resilience.”). The retirement of generation before the end of its

useful life may be an appropriate market response if the costs associated with that plant are sufficiently higher than those of their competitors.

B. The DOE Staff Report Recommends Further Analysis of Resilience and Wholesale Market Changes, Not an Immediate Regulatory Intervention.

To the extent the DOE Staff Report identifies issues and challenges in the wholesale electric markets, it urges continued work on valuing reliability services but primarily recommends further review, analysis, and study of system resilience, and actions consistent with those assessments. For example:

- The DOE Staff Report finds that “[a] continual comprehensive regional and national review is needed to determine how a portfolio of domestic energy resources can be developed to ensure grid reliability and resilience.” DOE Staff Report at 14.
- “Where feasible and within its statutory authority, [the Commission] should study and make recommendations regarding efforts to require valuation of new and existing [essential reliability services] by creating fuel-neutral markets and/or regulatory mechanisms that compensate grid participants for services that are necessary to support reliable grid operations. *Pricing mechanisms or regulations should be fuel and technology neutral* and centered on the reliability services provided.” *Id.* at 126 (emphasis added).
- In looking forward, the DOE Staff Report suggests that “[r]esource portfolios could be complemented with wholesale market and product designs that recognize and complement resource diversity by compensating providers for the value of [essential reliability services] on a *technology-neutral* basis. *More work is needed* to define, quantify, and value resilience.” *Id.* at 100 (emphasis added).
- “*RTOs and ISOs* should further define criteria for resilience, identify how to include resilience in business practices, and examine resilience-related impacts of their resource mix.” *Id.* at 126 (emphasis added).

In those respects in which the DOE Staff Report recommends that policymakers act quickly, it suggests that those actions should be market-based, fuel-neutral, and consistent with the processes followed for successful RTO-driven reforms of recent years:

New market structures may be necessary to reflect [changing] market dynamics . . . RTO/ISOs are considering ways to better

support system resilience objectives in the same way that they explicitly recognized and administratively incorporated reliability standards into dispatch practices in the past. For example, the variety of problems that arose during the Polar Vortex . . . caused PJM and ISO-NE to change their capacity market rules to ensure generator performance during scarcity conditions. In summary, the debates surrounding wholesale markets are complex and multifaceted, but *the institutions and the grid itself have historically proven flexible, strong, and able to adapt*. Questions about revenue sufficiency and resilience must be addressed quickly, before the fast-moving evolution of our power system outpaces our ability to understand and manage it responsibly.

Id. at 118 (emphasis added); *see also id.* at 126 (Commission “should expedite its efforts with states, RTO/ISOs, and other stakeholders to improve energy price formation in centrally-organized wholesale electricity markets. After several years of fact finding and technical conferences, the record now supports energy price formation reform, such as the proposals laid out by PJM and others”).

While citing improvement in energy price formation, the DOE Staff Report does not recommend that RTOs provide full cost recovery for favored resources, as the Proposal would require. Only in the report’s final section, “Areas for Further Research,” does it intimate that cost-of-service treatment for certain resources is a potential option to promote system resilience. *Id.* at 129. The report suggests that the states—not the federal government—should “explore the costs and benefits” of such an approach. *Id.*

C. Other Studies Demonstrate that the Proposal’s Focus on “Baseload” Resources and Fuel Supply Is Flawed.

The Commission should look to independent analyses of the electric markets, which confirm that actual power sector conditions and experience show that the premises of the Proposal’s approach of rescuing uneconomic generation resources with federal intervention are mistaken. For example, in June 2017 the international economics consulting firm Analysis Group

published a report, *Electricity Markets, Reliability and the Evolving U.S. Power System* (“Analysis Group Report”),³² which rebutted the Proposal’s understanding that recent changes in the wholesale electric markets and resource retirements are imperiling electric system reliability:

The retirement of aging resources is a natural element of efficient and competitive market forces, and where markets are performing well, these retirements mainly represent the efficient exit of uncompetitive assets, resulting in long-run consumer benefits Although some commentators have raised concerns that the declining financial viability of certain conventional power plant technologies (like coal and nuclear power plants) that operate as merchant units in several wholesale electricity markets may be jeopardizing electric system reliability, there is no evidence supporting that conclusion.

Analysis Group Report at 4-5. The report also cited the promise of advanced energy technologies in serving future reliability needs:

Many advanced energy technologies can and do provide reliability benefits by increasing the diversity of the system. The addition of newer, more technologically advanced and more efficient natural gas and renewable technologies is rendering the power systems in this country more, rather than less, diverse. These newer generating resources are also contributing to the varied reliability services—such [as] frequency and voltage management, ramping and load-following capabilities, provision of contingency and replacement reserves, black start capability, and sufficient electricity output to meet demand at all times—that electric grids require to provide electric service to consumers on an around-the-clock basis. As a result, increasing quantities of natural gas and renewable generation are increasing the diversity of the power system and supporting continued reliable operations.

Id. at 5. In this regard, the Proposal also ignores DOE’s own analyses of the reliability benefits of adding renewable energy to the grid. For example, a recent study by the National Renewable

³² Paul Hibbard et al., *Electricity Markets, Reliability and the Evolving U.S. Power System*, Analysis Group (June 2017), available at http://www.analysisgroup.com/uploadedfiles/content/insights/publishing/ag_markets_reliability_final_june_2017.pdf.

Energy Laboratory (“NREL”) concluded that with high penetrations of wind and solar power, the Western grid can maintain reliability and stability during large grid disturbances; and, in fact, renewable energy can contribute to a more, not less, reliable power grid.³³ Other analyses similarly identify the capabilities of renewable resources and new technologies to support grid reliability and resilience, which the Proposal arbitrarily ignores.³⁴

Contrary to the Proposal’s misconceptions, fuel supply issues played essentially no role in recent customer outages. A recent analysis by the Rhodium Group analyzed DOE data on the causes of the 3.4 billion customer-hours of outages from 2012 to 2016. Of that time, only 2,382 hours, or 0.00007 percent of the total, was due to fuel supply problems. Of those, 2,333 hours

³³ National Renewable Energy Laboratory, *Western Grid Can Handle High Renewables in Challenging Conditions* (Fact Sheet) (Nov. 2015), available at <https://www.nrel.gov/docs/fy16osti/65302.pdf> and <https://www.nrel.gov/grid/wwsis.html>.

³⁴ The Brattle Group consultancy recently published a report reaching much the same conclusions. Judy Chang et al., *Advancing Past “Baseload” to a Flexible Grid*, Brattle Group, at iv (June 2017), available at http://www.brattle.com/system/publications/pdfs/000/005/456/original/Advancing_Past_Baseload_to_a_Flexible_Grid.pdf?1498482432 (“[G]iven the current trends of market fundamentals, public policy goals, and customer preferences, labeling any resources as “baseload” and compensating them on that basis alone does not help improve our electricity system’s reliability, efficiency, or effectiveness. System planners and operators have been and are continuing to improve mechanisms for mobilizing and compensating the flexibility services that are needed to maintain a cost-effective and reliable electricity system.”); *id.* at 13 (“Despite these significant retirements and the associated shift [in] resource mix, system operators have been able to meet the industry’s high and increasing reliability standards.”); *id.* at 23 (“The market designs for centralized wholesale markets in the U.S. are quite sophisticated and evolving to provide the necessary incentives to a broad range of resources that can contribute to system reliability.”); *id.* at 31 (“[T]echnologies, market fundamentals, policy priorities, and customer preferences are changing rapidly—all pointing to an increasingly broad range of different supply and demand resources; a more dynamic and versatile grid that can operationally integrate these resources and new technologies; and wholesale power markets that will increasingly reward both supply and demand resources for providing well-defined services and attributes such as energy, capacity, flexibility, and emissions reductions.”).

were due to fuel supply disruptions at a coal-fired power plant in northern Minnesota.³⁵ The most prevalent cause of outages is severe weather, with Hurricane Sandy accounting for nearly-one third of the total hours of power lost over that period. Puerto Rico's nearly complete power outage in the wake of Hurricane Maria has already accounted for nearly twice the total number of outage hours for 2016.³⁶

D. The Proposal Is Not Responsive to the Circumstances of the Polar Vortex or Recent Extreme Weather Events.

The Proposal says that its proposed tariffs are necessary to address electric reliability issues that are illustrated by the widespread cold-weather event during the winter of 2014 known as the Polar Vortex, as well as other extreme weather events. The Proposal further suggests it should be finalized in time to protect against cold-weather events this coming winter. *See* Proposal at 46,945.³⁷ The Proposal's account of electric system challenges during those events is deeply flawed, and the circumstances of those events do not support the Proposal.

With regard to the Polar Vortex, large swaths of the eastern and southern parts of the United States faced sustained and record-setting cold weather during that period. According to NERC's post-mortem analysis, less than 0.1 percent of customer load was disrupted in the

³⁵ Trevor Houser et al., *The Real Electricity Reliability Crisis*, Rhodium Group (Oct. 3, 2017), at <http://rhg.com/notes/the-real-electricity-reliability-crisis>.

³⁶ *Id.*

³⁷ Commission staff's recent report on energy market conditions during the upcoming winter utterly contradicts the supposed urgency of implementing the Proposal, concluding that "[a]ll regions are expected to maintain healthy reserve margins for the winter," "[s]taff analysis identifies few major concerns," "[t]he markets appear to be prepared to manage disruptive events" and "at this time we do not see major risk factors that would likely lead to significant market disruptions during this winter." Winter Energy Market Assessment at 13, 19.

affected areas, and system operators “successfully maintained reliability. . . .”³⁸ In fact, the affected load was in South Carolina Electric and Gas service territory, which is not part of an organized wholesale market, and the outages were caused by frozen equipment at generators, *not* by fuel supply issues.³⁹ While much of the commentary regarding the Polar Vortex has focused on curtailment of natural gas supplies for electric generation, according to NERC, fuel supply issues accounted for less than half of the generator outages associated with the Polar Vortex. Instead, the majority were associated with the direct effects of cold weather on generation and transmission equipment. *Id.* at 4-5. For example, at the height of the cold weather, PJM reported that more than 15,000 MW of its coal and nuclear resources were offline.⁴⁰ In short, fuel supply was only one of several causes of electric system stress during the Polar Vortex,⁴¹ and there is no evidence that a system with fewer coal and nuclear resources would fare worse in the future,

³⁸ See NERC, *Polar Vortex Review* at iii (2014), at http://www.nerc.com/pa/rrm/January%202014%20Polar%20Vortex%20Review/Polar_Vortex_Review_29_Sept_2014_Final.pdf.

³⁹ *Id.* at iii, 2, 3.

⁴⁰ PJM Interconnection, *Analysis of Operational Events and Market Impacts During the January 2014 Cold Weather Events* at 26 (May 8, 2014), available at <http://www.pjm.com/~media/library/reports-notice/weather-related/20140509-analysis-of-operational-events-and-market-impacts-during-the-jan-2014-cold-weather-events.ashx>. See also *id.* at 4 (“Equipment issues associated with both coal and natural gas units caused the greatest proportion of forced outages. Natural gas interruptions comprised approximately 25 percent of the total outages.”); *id.* at 24 (“All conventional forms of generation, including natural gas, coal and nuclear plants, were challenged by the extreme conditions.”). See also MISO, *2013-2014 MISO Cold Weather Operations Report* at 25 (Nov. 2014), available at <https://www.misoenergy.org/Library/Repository/Report/Seasonal%20Market%20Assessments/2013-2014%20Cold%20Weather%20Operations%20Report.pdf> (“[G]enerating units of all fuel types in MISO’s footprint were affected by weather-related forced outages during the January 2014 polar vortex.”).

⁴¹ Nor are fuel supply issues unique to natural gas facilities. See MISO, *supra* note 40, at 13 (noting that “at least one power plant in MISO’s footprint that has coal delivered to it via barge experienced problems due to iced-over rivers and lakes”).

especially given the many market reforms that have occurred since the Polar Vortex. Just as importantly, resources other than coal and nuclear played a significant role in maintaining system reliability, including energy efficiency, demand response, and renewables.⁴²

All generation sources face challenges from extreme weather.⁴³ Even with on-site fuel supplies, the Proposal's favored resources do not always have the ability to run in challenging weather events, based on recent experience. For instance, in Texas, following Hurricane Harvey's torrential flooding, the external coal pile at the 2,500 MW W.A. Parish coal power plant was "so saturated with rainwater that coal was unable to be delivered into the silos from the conveyer system," and two units at the facility were switched to natural gas.⁴⁴ In Florida, as Hurricane Irma approached in September, one of the state's two nuclear power plants shut down, and the other ran at reduced capacity.⁴⁵ These anecdotes demonstrate that the Proposal's

⁴² See, e.g., Susan Tierney et al., *Electric System Reliability and the EPA's Clean Power Plan: The Case of PJM*, Analysis Group, at 12-13 (Mar. 2015), available at http://www.analysisgroup.com/uploadedfiles/content/insights/publishing/electric_system_reliability_and_epas_clean_power_plan_case_of_pjm.pdf (PJM utilized demand response and wind generation to meet demand, despite substantial loss of coal, nuclear, and natural gas capacity); Greg Hresko et al., *Wind Energy Saves Consumers Money During the Polar Vortex*, American Wind Energy Association, at 1 (Jan. 2015), available at <http://awea.files.cms-plus.com/AWEA%20Cold%20Snap%20Report%20Final%20-%20January%202015.pdf> ("[W]ind energy provided large quantities of critical electricity supply when it was needed most, keeping the lights on and reducing the impact of these price spikes").

⁴³ A profound irony of the Proposal is that it seeks to prolong operations at coal-fired power plants and also their substantial greenhouse gas emissions, which are worsening the risks of extreme weather events that are driven or exacerbated by climate change. The Proposal does not mention or acknowledge that its approach could increase greenhouse gas emissions. See Section VI.C, *infra*.

⁴⁴ See Mark Watson, *Harvey's Rain Caused Coal-to-Gas Switching*, Platts (Sept. 27, 2017), at <https://www.platts.com/latest-news/electric-power/houston/harveys-rain-caused-coal-to-gas-switching-nrg-21081527>.

⁴⁵ See *Hurricane Irma Caused Power Outages for Two out of Three Florida Customers*, Electric Light & Power (Sept. 20, 2017), at <http://www.elp.com/articles/2017/09/hurricane-irma-caused-power-outages-for-two-out-of-three-florida-customers.html> ("Hurricane Irma also affected Florida's two nuclear power plants, which are among the largest power plants in the state. Both

assumptions about the resilience of the favored resources are false, and that the resilience values of other resources warrant greater consideration.⁴⁶

V. The States' Experiences with Clean Energy Development and the Retirement of Aging, Uneconomic Generation Demonstrates There is No Pressing Reliability or Resilience Crisis Warranting Extraordinary Federal Intervention.

The Proposal's alarm regarding the growth of renewable resources (*see, e.g.*, Proposal at 46,943) is at odds with our States' success in integrating clean energy sources into the electric sector. For example:

- **California** has made rapid advances towards integration of renewable supply-side technologies and demand-side programs while simultaneously managing the retirement of baseload plants. Since 2003, procurement by California's large investor owned utilities⁴⁷ has resulted in 15,565 MW of installed renewable capacity under the Renewables Portfolio Standard ("RPS") program.⁴⁸ The average RPS portfolio for these utilities, which serve about 68% of California's electrical load, grew from 13.25% in 2003 to 32% in 2016.⁴⁹ On May 16, 2017, over 40% of California ISO ("CAISO") load was served with renewables (not including large hydro or behind-the-meter solar PV), and during peak renewables

reactors at the Turkey Point nuclear power plant in south Florida were shut down as a precaution before the storm arrived. The St. Lucie nuclear power plant remained operating, although at reduced levels.").

⁴⁶ See Amory B. Lovins, *Does 'Fuel on Hand' Make Coal and Nuclear Power Plants More Valuable?*, Forbes (May 1, 2017), at <https://www.forbes.com/sites/amorylovins/2017/05/01/does-fuel-on-hand-make-coal-and-nuclear-power-plants-more-valuable/#4a0d9d5c69023>.

⁴⁷ Pacific Gas and Electric Company, San Diego Gas & Electric Company, and Southern California Edison.

⁴⁸ Cal. Pub. Utils. Comm'n, *Renewables Portfolio Standard Quarterly Report* at 6 (4th quarter 2016), available at http://www.cpuc.ca.gov/uploadedFiles/CPUC_Website/Content/Utilities_and_Industries/Energy/Reports_and_White_Papers/Q4_2016_RPS_Report_to_the_Legislature_FINAL.pdf.

⁴⁹ Cal. Pub. Utils. Comm'n, *Biennial RPS Program Update* (Jan. 2016), available at <http://www.cpuc.ca.gov/WorkArea/DownloadAsset.aspx?id=8323S>. See also Cal. Pub. Utils. Comm'n, Proceeding No. R.15-02-020, available at https://apps.cpuc.ca.gov/apex/f?p=401:56:0::NO:RP,57,RIR:P5_PROCEEDING_SELECT:R1502020 (containing investor-owned utilities' RPS compliance filings).

production that day, renewables supplied nearly 72% of CAISO's electricity.⁵⁰ Renewable technologies contributed significantly to meeting CAISO system load during a record breaking heat wave on September 1, 2017, with the vast majority of that contribution coming from solar photovoltaic installations.⁵¹

- In **Connecticut**, the state has implemented policies that have directly procured commitments of renewable energy generation and energy efficiency that equal the generation of a large power plant, at competitive pricing. Specifically, in 2016 alone, the state procured over 400 MW of state-solicited small scale renewable energy and energy efficiency resources, 170 MW of which will be located in Connecticut, and close to 400 MW of large-scale renewable energy projects split between Connecticut, Massachusetts, and Rhode Island. The price of these selected grid-scale bids dropped by nearly half compared to procurements in 2012 and 2013. Using its procurement authority thus far, Connecticut has solicited long-term contracts with clean energy resources to meet over 5% of its electric load. Connecticut has authority remaining to contract an additional approximate 17% of load with clean energy resources.⁵² These procurements have expressly focused on renewable resources that provide generation during peak load times, directly strengthening grid reliability and resilience.⁵³
- In **Illinois**, there is currently more than 4,000 MW of wind power installed, growing from just 50 MW in 2003.⁵⁴ Illinois wind farms produced 612,000 megawatt hours ("MWh") of electricity in July 2017, up 52% from the prior

⁵⁰ CAISO, *Renewables Watch for Operating Day May 16, 2017*, at http://content.caiso.com/green/renewrpt/20170516_DailyRenewablesWatch.pdf; Gavin Bade, *CAISO: Renewables Served 42% of California Demand on May 16, Setting Record*, Utility Dive (May 18, 2017), at <http://www.utilitydive.com/news/caiso-renewables-served-42-of-california-demand-on-may-16-setting-record/442926/>. Note that the RPS program measures compliance in MWh, whereas CAISO data measure load percentages in MW.

⁵¹ CAISO, *Renewables Watch for Operating Day September 01, 2017*, at http://content.caiso.com/green/renewrpt/20170901_DailyRenewablesWatch.pdf.

⁵² Connecticut Department of Energy and Environmental Protection, *2017 Comprehensive Energy Strategy, Draft Executive Summary* (July 26, 2017), available at http://www.ct.gov/deep/lib/deep/energy/ces/2017_draft_comprehensiveenergystrategy_execsummary.pdf.

⁵³ See Affordable and Reliable Energy, 2015 Conn. Legis. Serv. P.A. 15-107 (S.B. 1078) (enacted), available at <https://www.cga.ct.gov/2015/act/Pa/pdf/2015PA-00107-R00SB-01078-PA.PDF>.

⁵⁴ American Wind Energy Association, *Illinois Wind Facts*, available at <https://www.awea.org/resources/statefactsheets.aspx> (last visited Oct. 21, 2017).

year.⁵⁵ Over the last year, nuclear power remained essentially constant, and coal based generation decreased 8.8%, while still providing 6,417,000 MWh of energy in 2017.⁵⁶

- **In Maryland**, approximately 1,458 MW of generation capacity comes from renewable resources.⁵⁷ Maryland customers currently have access to over 750 MW of installed solar power, with 276.9 MW of installed solar energy having been added in 2016 alone.⁵⁸ Marylanders also have access to over 250 MW of installed wind power, and the state has taken significant steps toward the development of its offshore wind resources. In May 2017, the Maryland Public Service Commission awarded offshore wind renewable energy credits to two projects, which will pave the way for the construction of 368 MW of capacity off the coast of Maryland.
- **Massachusetts** renewable and clean energy projects have added or are in the process of adding a total of approximately 26,000,000 MWh of annual electricity for Massachusetts customers (expected to be over 50% of Massachusetts's annual electric load) under either statutory or regulatory mandates pursuant to the Green Communities Act, St. 2008, c. 169, §§ 83, 83A, 83C, and 83D, and the Renewable Portfolio Standards, Mass. Gen. Laws ch. 25A, § 11F.⁵⁹
- **Oregon** is the eighth-ranked state in the nation for installed wind capacity, with 3,213 MW in operation.⁶⁰ A total of forty-four projects span the state, with the first project installed in 1998. Individual utility-scale wind projects range from 10

⁵⁵ U.S. Energy Information Administration, Electric Power Monthly (Sept. 2017 release), available at https://www.eia.gov/electricity/monthly/epm_table_grapher.php?t=epmt_1_14_a.

⁵⁶ U.S. Energy Information Administration, Electric Power Monthly (Sept. 2017 release), available at https://www.eia.gov/electricity/monthly/epm_table_grapher.php?t=epmt_1_09_a (nuclear); https://www.eia.gov/electricity/monthly/epm_table_grapher.php?t=epmt_1_04_a (coal).

⁵⁷ See Maryland Department of Natural Resources, *Maryland Power Plants and the Environment: A Review of the Impacts of Power Plants and Transmission Lines on Maryland's Natural Resources*, DNR Publication No. 12-12132016-638 (Dec. 2016), available at http://www.pprp.info/ceir18/CEIR_18_Summary%20FINAL.pdf.

⁵⁸ See Solar Energy Industries Association, *Solar State by State*, at <https://www.seia.org/state-solar-policy/maryland-solar> (last visited Oct. 21, 2017).

⁵⁹ These projects include onshore and offshore wind, hydropower, and solar. Some of these projects are already in operation, some are under contract and awaiting regulatory approval prior to construction, some are constructed and waiting for interconnection, and others are in the bidding stage.

⁶⁰ American Wind Energy Association, *Oregon Wind Facts*, at <https://www.awea.org/resources/statefactsheets.aspx> (last visited Oct. 21, 2017).

MW to nearly 900 MW.⁶¹ As of mid-2017, the wind projects in Oregon powered the equivalent of over 660,000 homes.

- **Vermont** has over 200 MW of installed solar (about 5% of sales and 20% of peak load) and over 100 MW of installed wind (about 6% of sales), not to mention 200 MW of hydropower and approximately 100 MW of biopower (biomass and farm and landfill methane). The State's electric utilities are on course to meet their 55% renewable electricity by 2017 targets, and are required to meet 75% of sales with renewable electricity by 2032. *See* 30 Vt. Stat. Ann. § 8005(a)(1)(B). All utility and merchant generation in Vermont is subject to state siting regulation and must adhere to a number of criteria, including need, least-cost principles (for utility-owned generation, this entails an examination of whether the investment is the least-cost solution to demand when compared with energy conservation, efficiency, and load management), and maintenance of system stability and reliability. *See, e.g.,* 30 Vt. Stat. Ann. § 248(b). The State gradually lifted its net metering cap from 2% to 4% to 15% of load as no adverse negative impacts to system stability were observed, and now there is no set cap. *See* 30 Vt. Stat. Ann. § 8010 (Self-Generation and Net-Metering); Vt. Admin. Code 18-1-17:5.100 (Construction and Operation of Net Metering Systems).
- **Washington** is one of the top ten states in the nation for installed wind capacity, having successfully integrated over 3,000 MW of wind power since 2001.⁶² In 2016 alone, the energy produced from wind in Washington powered the equivalent of almost 750,000 homes.⁶³

In addition, many states and regional markets have successfully managed the retirement of coal and other uneconomic resources and are pursuing innovations that will benefit system reliability and resilience, including market-based compensation for demand response and investments in energy efficiency, energy storage, and other technologies. For example:

- As the DOE Staff Report noted with respect to energy storage, “**California** has directed its utilities to acquire 500 MW of energy storage by 2020; **Massachusetts** [has set a target for electric companies] to procure 200 MWh of energy storage by the end of 2019; **New York**’s legislators have proposed

⁶¹ Renewable Northwest Project, Renewable Energy Projects, *at* http://www.rnp.org/project_map?field_project_state_value%5B%5D=OR&tid%5B%5D=7&field_project_opstatus_value%5B%5D=Operating (last visited Oct. 21, 2017).

⁶² U.S. Energy Information Administration, Washington State Profile (2016), *at* <https://www.eia.gov/state/analysis.php?sid=WA>.

⁶³ American Wind Energy Association, Washington Wind Facts, *at* <https://www.awea.org/resources/statefactsheets.aspx> (last visited Oct. 21, 2017).

creation of an Energy Storage Deployment Program, with a 2030 procurement target; **Maryland** has adopted at 30 percent investment tax credit for storage facilities; and **Nevada**'s legislature has passed a storage incentivize. These programs are generally technology-neutral and will support the use of storage at the grid-level or behind the meter (on the customer's premises)." DOE Staff Report at 74.

- **California**, through its Public Utilities Commission, has authorized a competitive procurement mechanism for demand response resources, known as the Demand Response Auction Mechanism ("DRAM") pilot. The objective of the DRAM is to ensure competitively priced, cost-effective and reliable demand response resources for the state. Demand response resources procured through the DRAM are required to bid their capacity into CAISO energy markets for market award dispatches, with approximately 184 MWs under contract for delivery in 2018. In addition, California has prioritized development of energy storage through a 1.325 gigawatt procurement mandate, reliability standards, creation of wholesale market products and rules with the Distributed Energy Resource Provider and Non-Generator Resource models, and approving storage contracts to meet local reliability needs and partially replace the San Onofre nuclear generating station. California regulators developed a roadmap to consider and eliminate unnecessary regulatory barriers to storage market participation and are in the process of developing rules by which a storage resource can serve multiple reliability functions.⁶⁴
- **Connecticut** has developed a first-in-the-nation statewide microgrid program to build local resiliency for electrical load in critical community operations. This program implementation now includes five operational microgrids and five in development.⁶⁵ Through its conservation and load management program, Connecticut invests approximately \$246 million annually in statewide energy efficiency programs that has saved residents and businesses 1.29 billion kWh of electricity, 19.6 million ccf of gas, and 976 thousand tons of carbon dioxide.⁶⁶ In addition, through its 2016 solicitations for clean energy resources, Connecticut solicited through a competitive process an additional 34 MW of energy efficiency at a competitive price.⁶⁷

⁶⁴ California Energy Commission, California Public Utilities Commission & CAISO, *Advancing and Maximizing the Value of Energy Storage Technology – A California Roadmap* (Dec. 2014), available at https://www.caiso.com/Documents/Advancing-MaximizingValueofEnergyStorageTechnology_CaliforniaRoadmap.pdf.

⁶⁵ See Connecticut Department of Energy & Environmental Protection, *supra* note 52.

⁶⁶ Connecticut Department of Energy & Environmental Protection, *Energy Efficiency*, available at <http://www.ct.gov/deep/cwp/view.asp?a=4405&Q=513716>.

⁶⁷ *Id.*

- **Maryland** is encouraging energy efficiency through the State’s EmPOWER program, which was first enacted in 2008. *See* EmPOWER Maryland Energy Efficiency Act of 2008, H.B. 374, 2008 Gen. Assemb., Reg. Sess. (Md. 2008). Implementation of the EmPOWER program led to a 15% reduction in demand based on a 2007 baseline. During the 2017 legislative session, the Maryland General Assembly extended the EmPOWER program through 2023. *See* H.B. 514, 2017 Gen. Assemb., Reg. Sess. (Md. 2017). In addition, Maryland has started to explore energy storage using grid-connected battery systems as an important tool that will facilitate the integration of renewable energy, bolster grid reliability, and provide for flexibility in the grid. In 2017, the Maryland General Assembly adopted measures both to encourage the installation of energy storage through a dedicated tax credit⁶⁸ and to study methods to promote the deployment of energy storage on all parts of the electricity grid.⁶⁹ *See* S.B. 758, 2017 Gen. Assemb., Reg. Sess. (Md. 2017) (tax credit); H.B. 773, 2017 Gen. Assemb., Reg. Sess. (Md. 2017) (methods study). The Maryland Public Service Commission is also considering how energy storage may advance the goal of transforming state’s distribution system.⁷⁰
- In **Massachusetts**, 1,662 MW of coal generation capacity has been retired since 2008, leaving no coal fired power plants in the state. At the same time, Massachusetts has invested heavily in developing a robust clean energy industry, as detailed *infra*, and has become a national leader in energy efficiency. Further, it is actively exploring storage technologies, and the Department of Energy Resources issued a report last fall with the goal of spurring investment in 600 MW of grid-scale energy storage in Massachusetts by 2025.⁷¹
- Spurred by the 1988 bankruptcy of its largest utility as triggered by cost overruns and construction delays at the Seabrook nuclear power plant, **New Hampshire** was among the first states to opt for restructuring, *see* N.H. Laws 1996, ch. 129,

⁶⁸ Maryland’s new tax credit provides for up to \$5,000.00 for a system installed on a residential property and the lesser of \$75,000 or 30% of the cost of installation of a system installed on a commercial property.

⁶⁹ The law requires that Maryland’s Power Plant Research Program conduct a study—in collaboration with other state stakeholders—and submit a report by December 1, 2018, as to the regulatory reforms and market incentives necessary or beneficial to increase the use of energy storage devices in the state.

⁷⁰ *See* Maryland Public Service Commission, *In The Matter of Transforming Maryland’s Electric Distribution Systems to Ensure that Electric Service is Customer-Centered, Affordable, Reliable and Environmentally Sustainable in Maryland*, PC44, Notice of Public Conference, at 3 (Sept. 26, 2016).

⁷¹ Massachusetts Department of Energy Resources, *State of Charge: Massachusetts Energy Storage Initiative Study* (Sept. 16, 2016), available at <https://www.mass.gov/files/2017-07/state-of-charge-report.pdf>.

but lawmakers then paused the process as to the utility's non-nuclear generation portfolio, including two coal-fired plants—Merrimack and Schiller Stations—because relying on these facilities was cheaper for end-users than purchasing power at wholesale. But technological and market realities evolved and, in 2015, the New Hampshire Legislature authorized the completion of the restructuring process, provided that the Public Utilities Commission made a “public interest” finding that considered general economic and specific ratepayer impacts. *See* N.H. Laws 2015, ch. 221:10, codified as N.H. RSA 369-B:3-a. On October 12, 2017, the utility filed the results of the asset divestiture auction.⁷² If approved, the proposed sale of Merrimack and Schiller stations would result in some \$600 million in stranded cost recovery for the utility, in exchange for which ratepayers would no longer be required to subsidize the operation of coal plants whose dispatch pattern in recent years has reduced them to occasionally used resources.

- The only operating coal plant in **Oregon** is in Boardman and is scheduled for closure in 2020. The plant owner, Portland General Electric, is testing the potential to convert the plant into a renewable energy generation facility using biomass for fuel.⁷³ Oregon investor-owned electric utilities are exploring energy storage because the passage of HB 2193 (2015) mandates energy storage be installed at each utility by 2020. Through a collaborative stakeholder process at the Oregon Public Utilities Commission (Docket UM 17510), the utilities are focusing on many potential benefits of energy storage, including increasing transmission and distribution reliability and increasing energy system resiliency.⁷⁴
- The capacity of **Vermont's** solar installations alone is equivalent to one-fifth of the state's peak load, and every new proposed project is required to meet interconnection standards to ensure it does not adversely affect system stability and reliability. While solar has shifted Vermont's peak from mid-day to evening, the state's peak has declined due to the state's aggressive pursuit of conservation and energy efficiency, and utilities are adjusting to changes in load shape using traditional tools such as rate design, load shifting, and demand response as well as emerging tools such as real-time weather forecasting and advanced energy storage. Vermont currently has a large utility-owned battery storage project that

⁷² J.P Morgan Securities, LLC, *Public Service Company of New Hampshire d/b/a Eversource Energy Sale of Generating Facilities: Report of the Auction Advisor*, N.H. Pub. Utils. Comm'n Docket No. 17-254 (Oct. 12, 2017), available at http://puc.nh.gov/Regulatory/Docketbk/2017/17-124/LETTERS-MEMOS-TARIFFS/17-124_2017-10-12_JPMORGAN_AUCTION_RPT.PDF; *see also* New Hampshire Public Utilities Commission, Docket No. 17-124, available at <https://www.puc.nh.gov/Regulatory/Docketbk/2017/17-124.html>.

⁷³ Portland General Electric, Resource Planning, at <https://www.portlandgeneral.com/our-company/energy-strategy/resource-planning> (last visited Oct. 21, 2017).

⁷⁴ Oregon Public Utilities Commission, Docket UM-17510, available at <http://apps.puc.state.or.us/edockets/docket.asp?DocketID=19733>.

reduces utility peaks, integrates solar, and can enhance grid reliability by islanding a distribution circuit hosting the local emergency shelter in the event of a wider grid outage. That same utility is pursuing other solar-plus-storage projects and is also embarking on a pilot to deploy up to 10 MW of residential storage systems to provide grid services in the aggregate and reliability to individual customers.

VI. The Proposal Poses a Serious Threat of Harm to the States and Excessive Costs for Ratepayers.

The State Commenters are deeply concerned that, in its current form, the Proposal would cause significant harm to our States by compelling ratepayers to subsidize costly power generation resources without demonstrated need or benefit, undermining State energy laws and policies, and by putting public health and the environment at greater risk.

A. A Federal Mandate to Subsidize the “Fuel-Secure” Resources Will Significantly and Unnecessarily Raise Energy Costs for Consumers.

There is no question that the Proposal will burden ratepayers with additional costs and risks. Indeed, the Proposal makes no attempt to argue otherwise.⁷⁵ Rather, the whole point of the Proposal is to charge customers more money and to give that money to uneconomic generation resources so they do not retire. One early analysis estimates potential added customer costs in the billions of dollars per year.⁷⁶ Yet, the Proposal provides no assessment of, or justification for,

⁷⁵ As noted in Sections I, II.A, and II.B, *supra*, the Proposal provides no analysis regarding the customer costs. The absence of a cost analysis is cause enough for the Commission to reject it.

⁷⁶ See Robbie Orvis et al., *The Department of Energy’s Grid Resilience Pricing Proposal: A Cost Analysis*, Energy Innovation (Oct. 2017), available at http://energyinnovation.org/wp-content/uploads/2017/10/20171021_Resilience-NOPR-Cost-Research-Note-FINAL.pdf (annual cost to customers conservatively estimated at \$2.4 -10.6 billion); ICF International, Inc., *DOE Acts to Transform the Energy Landscape*, at 27 [Webinar] (Oct. 4, 2017), available at <https://www.icf.com/resources/webinars/2017/doe-nopr> (cost could reach \$3.8 billion per year); see also Jeff St. John, *FERC Commissioners and Staff Question DOE’s Push for Cost Recovery for Coal and Nuclear*, Greentech Media (Oct. 10, 2017), at <https://www.greentechmedia.com/articles/read/ferc-commissioners-and-staff-question-does-push-for-cost-recovery-for-coal#gs.lnQFaSg>.

those costs or the value of what customers will get in return. Indeed, no one has provided customers or their state representatives with any cost information nor consulted with them about whether they think a federal mandate to spend extra money to prevent the retirement of these uneconomic facilities is reasonable. Moreover, unlike other types of targeted incentives that the federal government and states provide under specific laws to advance public policies, customers will pay all of the direct costs associated with full cost recovery for the preferred, otherwise non-competitive generation, and will also bear all the monetary risks associated with the operation, maintenance, and capital of the subsidized generation. This burden on customers is precisely what the wholesale markets are designed to avoid. The Proposal would result in an extraordinary transfer of wealth from customers to generation owners with only undefined and unquantified customer benefits, if any, but certain adverse environmental and public health effects.⁷⁷

B. The Proposal Undermines State Energy Laws and Policies.

Of great concern to the State Commenters are the implications of the Proposal for our respective state laws and policies regarding energy, including State restructuring statutes and renewable energy and climate goals. Overall, it is clear that the Proposal directly subsidizes generation resources in a manner that intrudes on states' role as overseers of "the economic aspects of electrical generation," *Pacific Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 206 (1983); *see also* Federal Power Act, § 201(b)(1), 16 U.S.C. § 824(b)(1) (Commission lacks general jurisdiction over "facilities used for the generation of

⁷⁷ In this sense, the Proposal is quite different from recently-established state zero-emission-credit programs that provide additional incentives to nuclear generation under state law authorities. These programs tie resource compensation to certain measurable environmental attributes that benefit air quality, public health, and the states' achievement of greenhouse gas emission reduction goals. *See, e.g.,* Illinois Power Agency Act, § 1-75(d-5), 20 ILCS 3855/1-5 *et seq.* (2016).

electric energy”). In this regard, the Proposal effectively overrides the choices made by the states with restructured electric markets to allow those markets, along with other policy decisions by states to promote alternative energy sources and to secure reductions in power sector emissions, to guide capacity additions and retirements, and the choices made by states with traditional cost-of-service regulation to retire facilities in the best interest of ratepayers.⁷⁸ For example:⁷⁹

Regional Greenhouse Gas Initiative

- First implemented in 2009, the Regional Greenhouse Gas Initiative (“RGGI”) is a mandatory market-based program of nine states in the Northeast and Mid-Atlantic that seeks to reduce power sector greenhouse gas (“GHG”) emissions.⁸⁰ The RGGI states have established a regional cap on carbon dioxide (“CO₂”) emissions from electric generators and require power plants to possess a tradable CO₂ allowance for each ton of CO₂ they emit.⁸¹ The emissions cap is set at 84.3 million short tons in 2017, and declines 2.5 percent each year until 2020 to about 78.2 million tons. The RGGI states are working diligently to meet their commitments, and in August 2017, announced a further CO₂ reduction to 55.7 million tons by 2030. This represents a 65 percent drop from regional CO₂ levels in 2009.⁸² By subsidizing coal generation sources, the Proposal would directly impede the achievement of the RGGI states’ emissions reduction goals.

California

- California is implementing numerous statutory mandates to support greenhouse gas reductions and mitigate climate change. Significant recent examples include the following:

⁷⁸ This intrusion into state prerogatives is in conflict with the Commission’s recent decisions, including Order No. 1000, which mandates regional transmission planning to *accommodate* state energy policies. *See* Order No. 1000, Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities, 76 Fed. Reg. 49,842 (Aug. 11, 2011).

⁷⁹ For additional information, see the comments filed by certain State Commenters’ respective state utilities regulators in this docket.

⁸⁰ The nine states are: Connecticut, Delaware, Maine, Maryland, Massachusetts, New Hampshire, New York, Rhode Island, and Vermont.

⁸¹ Regional Greenhouse Gas Initiative, Inc., *About the Regional Greenhouse Gas Initiative Fact Sheet* (June 2017), available at https://www.rggi.org/docs/Documents/RGGI_Fact_Sheet.pdf.

⁸² Alex Guillen, *RGGI States Plan Further 30 Percent Emissions Cut by 2030*, Politico (Aug. 23, 2017), at <http://www.politico.com/states/new-york/albany/whiteboard/2017/08/23/rggi-states-proposed-further-30-percent-emissions-cuts-by-2030-8613376>.

- SB 350 (De Leon),⁸³ which requires the state to establish GHG reduction planning targets through integrated resource planning for the electricity sector and increases the state's RPS to 50 percent by 2030.
- SB 32 (Pavley),⁸⁴ which codified an emissions reduction target of 40 percent below 1990 levels by 2030.
- SB 1383 (Lara),⁸⁵ which requires the development of a Short-Lived Climate Pollutant Strategy and sets forth specific 2030 targets:
 - 40 percent reduction in methane from 2013 levels;
 - 40 percent reduction in hydrofluorocarbon gases from 2013 levels; and
 - 50 percent reduction in anthropogenic black carbon.
- California has significantly reduced its coal capacity and as a result has seen significant greenhouse gas emissions reductions over the past decade.⁸⁶ The Proposal encourages an increased procurement of coal resources, which conflicts with California's energy goals and the direction the state has taken on maintaining a low-carbon grid.

Connecticut

- Connecticut introduced restructuring in 1998 in order to gain access to energy markets to benefit ratepayers.⁸⁷ Removing a significant part of the region's generation from competitive markets would frustrate that purpose and could prolong the life of coal-fired plants that would threaten timely achievement of Connecticut's Global Warming Solutions Act goals. The state's most recent inventory shows that the State has reduced greenhouse gas emissions 4 percent below 1990 levels and 14 percent below 2001 levels. Connecticut's statutory goal is to reduce emissions to 10% below 1990 levels by 2020 and 80% below 2001 levels by 2050. Conn. Gen. Stat. § 22a.200c.

⁸³ Available at https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201520160SB350.

⁸⁴ Available at https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201520160SB32.

⁸⁵ Available at https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201520160SB1383.

⁸⁶ California Air Resources Board, *2017 Edition California GHG Emissions Inventory: California Greenhouse Gas Emissions for 2000 to 2015 – Trends of Emissions and Other Indicators* (June 2017), available at https://www.arb.ca.gov/cc/inventory/pubs/reports/2000_2015/ghg_inventory_trends_00-15.pdf.

⁸⁷ See Connecticut Department of Energy and Environmental Protection, *supra* note 52.

Illinois

- In Illinois, the Electric Service Customer Choice and Rate Relief Act of 1997, 220 ILCS 5/16-101A, ushered in a transition to a competitive market for electric generation with the goal of employing competitive forces to “create new opportunities for new products and services for customers and lower costs for users of electricity.” Illinois law maintains the core statutory goals of ensuring the provision of “safe, reliable, and affordable service” by relying on market forces to keep prices just and reasonable. The law in Illinois is based on “the competitiveness of supply and [] price-responsiveness of the demand for service.” 220 ILCS 5/16-101A(f).
- The Illinois Energy Efficiency Portfolio Standard requires the state’s largest utilities to invest in energy efficiency and demand response measures, which help customers save energy and reduce usage during periods of high demand on the grid. Illinois’s largest utility, Commonwealth Edison Company (“ComEd”), which serves Chicago and a large part of Northern Illinois, recently reported that energy efficiency efforts have helped save customers 21.5 million MWh of energy—enough to power more than 2.3 million homes for a year—and has created customer savings of \$2.3 billion on electric bills. State legislation enacted in 2016 directed an expansion of energy efficiency programs in Illinois. For example, under the law, ComEd now has a goal of increasing efficiency programs to ultimately produce a 21.5 percent reduction in energy use by 2030. These efficiency efforts in Illinois reduce demands on the system, thereby increasing reliability and resiliency and obviating the need for expensive policies such as those Proposal.
- Since the restructuring of Illinois’s electricity laws, the risks and rewards associated with generation have been managed by generation owners. For example, NRG acquired six coal plants in Illinois through its subsidiary Midwest Generation, and repowered one of them to natural gas, keeping it operating.⁸⁸ It also closed two urban coal plants, reducing air pollution in city neighborhoods with no effect on resource adequacy.⁸⁹ Dynegy currently owns twelve fossil fuel plants: eight are coal, three are natural gas and one is coal and gas.⁹⁰ Dynegy has

⁸⁸ *Illinois coal plant to close a unit in clean-air move*, Crain’s Chicago Business (Aug. 7, 2014), available at <http://www.chicagobusiness.com/article/20140807/NEWS11/140809839/illinois-coal-plant-to-close-a-unit-in-clean-air-move>.

⁸⁹ Julie Wernau, *Redevelopment ahead for Chicago’s two coal plant sites*, Chicago Tribune (Dec. 1, 2014), available at <http://www.chicagotribune.com/business/ct-crawford-fisk-sites-1130-biz-20141126-story.html>.

⁹⁰ Dynegy Inc., *Dynegy in Illinois* (Feb. 2017), available at <https://www.dynegy.com/sites/default/files/dynegy-factsheet-Illinois.pdf>.

closed or suspended operations of five other units in Illinois.⁹¹ Despite these closings, Dynegy has sufficient capacity to meet as much as 95% of the MISO Zone 4 local clearing requirement (5,561 MW vs. 5,836 MW in the latest capacity auction).⁹²

- Prolonging the life of coal-fired power plants that are facing market signals to retire may make it more difficult or expensive to achieve the Illinois Renewable Portfolio Standard, which requires that 25% of the state's energy come from resources like wind and solar by 2025. Pursuant to state legislation enacted in 2016, the Illinois Power Agency is currently procuring one million renewable energy credits from new utility-scale wind and solar projects, which will provide energy at lower cost than energy from uneconomic coal plants.

Maryland

- In Maryland, the Electric Utility Industry Restructuring of 1999 required a transition to a competitive market for electric generation with the stated goals of, *inter alia*, establishing customer choice, providing economic benefits for all customer classes, and ensuring compliance with federal and state environmental standards. *See* S.B. 300, 1999 Gen. Assemb., Reg. Sess. (Md. 1999). Prolonging the life of coal-fired power plants in Maryland that might otherwise be close to retirement would threaten the progress achieved through RGGI, which Maryland is required to be a part of pursuant to Maryland's Healthy Air Act, Environ. Art. §§ 2-1001 through 2-1005. Through Maryland's participation in RGGI, Maryland has made a commitment to the use of renewable energy and achieving the State's climate goals. Maryland also has a robust renewable portfolio standard ("RPS"), which was created by law in 2004. It is a two-tiered system with carve-outs for solar energy and offshore wind energy, and corresponding renewable energy credits ("RECs") for each tier. Electric utilities and other electricity suppliers must submit RECs equal to a percentage specified in statute each year or else pay an alternative compliance payment ("ACP") equivalent to their shortfall. Over the past few years, the requirements have been met almost entirely through RECs, with negligible reliance on ACPs. In 2016, Maryland increased its RPS, requiring utilities to derive 25 percent of their energy from renewable resources by 2020. *See* H.B. 1106, 2016 Gen. Assemb., Reg. Sess. (Md. 2016).

⁹¹ Jacob Barker, *Why is Dynegy idling Illinois coal plants? It's more complicated than 'the war on coal'*, St. Louis Post-Dispatch, (May 28, 2016), available at http://www.stltoday.com/business/local/why-is-dynegy-idling-illinois-coal-plants-it-s-more/article_7a1bd217-a83d-579b-93a8-d17b86de27c4.html.

⁹² MISO, *supra* note 25, at 9.

Massachusetts

- In 1997, the Massachusetts Legislature enacted the Electric Industry Restructuring Act to restructure its electric utility industry. *See* Mass. St. 1997, ch. 164. The general purpose of the Restructuring Act was to take electric utilities out of the generation portion of the electricity business. *See* Mass. Gen. Laws ch. 164, §1A(b)(2) (referencing the electric companies' "requirement to divest generation facilities"). The Massachusetts Department of Public Utilities ("Department") has held that its limited role over the generation component of electricity service following the Restructuring Act "represents a clear policy choice that electric generation resources are best developed in response to price signals from a competitive marketplace." *Investigation by the Dep't of Pub. Utils.*, Mass. D.P.U. 12-77, at 28 (2013). More importantly, by moving electricity generation outside of the Department's jurisdiction and into the competitive marketplace, the Department found that the Restructuring Act "shifted the risks of generation development from consumers to generators, who are better positioned to manage those risks." *Id.* This shift in risk allowed consumers to benefit from lower prices for electricity while also enjoying protection from the "construction, operational, and prices risks that were inherent in commodity rate regulation." *Id.* Clearly, if the Commission were to impose on Massachusetts ratepayers a "cost-of-service" regime to support coal and nuclear generating resources, it would directly interfere with and contradict the Massachusetts legislature's intent to shield ratepayers from the operational risks and investment decisions of all generating resources.
- Further, Massachusetts's major investments in renewables and energy efficiency are deliberate efforts to create a clean energy industry and to address the risks of climate change. The Proposal is directly at odds with the energy policy chosen by Massachusetts. Massachusetts has adopted a broad portfolio of laws and regulations to reduce economy-wide greenhouse gas emissions by 25 percent by 2020 and 80 percent by 2050 from 1990 levels, including the Global Warming Solutions Act (2008), the Green Communities Act (2008), the Act to Promote Energy Diversity (2016), RGGI, and programs to promote low and zero-emission vehicles, among others. The clean energy industry is a powerful and growing economic engine for Massachusetts. The state has seen consistent growth across all aspects of the clean energy sector, from energy efficiency to alternative transportation, to renewable energy development. Clean energy contributes \$11.8 billion to the Massachusetts economy— a 2.5 percent share of the gross state product—and its employees account for 2.9 percent of the state's labor market. Since 2010, the number of clean energy jobs has increased dramatically — 45,000 new clean energy jobs have been added, a 75 percent increase.⁹³ This success has

⁹³ Massachusetts Clean Energy Center, *2016 Massachusetts Clean Energy Industry Report*, at 3-4, 8 (Dec. 2016), *available at* [http://files.masscec.com/2016%20MassCEC CE Report Complete%20%281%29-2.pdf](http://files.masscec.com/2016%20MassCEC%20CE%20Report%20Complete%20%281%29-2.pdf).

shown that states can grow their economies through investing in clean energy and reducing greenhouse gas emissions. The Proposal's attempt to force Massachusetts to subsidize nuclear and fossil fuel generating resources in contravention of its carefully developed renewable energy and climate policies is overreaching and inappropriate.

New Hampshire

- When New Hampshire became one of the first states to embrace wholesale and retail competition in the electric industry in 1996, it did so “to develop a more efficient industry structure and regulatory framework that results in a more productive economy by reducing costs to consumers while maintaining safe and reliable electric service with minimum adverse impacts on the environment.” N.H. RSA 374-F:1, I. The Legislature declared that competitive markets (as distinct from traditional cost-of-service regulation) “should provide electricity suppliers with incentives to operate efficiently and cleanly, open markets for new and improved technologies, provide electricity buyers and sellers with appropriate price signals, and improve public confidence in the electric utility industry.” *Id.* at II. The industry has evolved since 1996 and, accordingly, in 2008 New Hampshire authorized utilities to make (and to include in rate base) certain new investments related to generation—but, in contrast to the reliance on fossil and nuclear resources of the past, these new investments are limited to “renewable and clean distributed energy resources.” N.H. RSA 374-G:1 (noting that such investments “provide energy security and diversity by eliminating, displacing or better managing traditional fossil fuel energy deliveries from the centralized bulk power grid”).

Vermont

- Vermont has a number of state energy laws and policies that can only be achieved by reducing load, strategically electrifying the heating and transportation sectors, and meeting demand with renewable energy. *See, e.g.*, 30 Vt. Stat. Ann. § 202a(1), (2) (goals include efficiency, environmentally sound energy supply, and wise use of renewables). Tariffs that support non-renewable resources to the detriment of renewables will adversely impact the State's ability to meet its policy goal of 90% renewable energy across all sectors by 2050.⁹⁴ Such tariffs will also adversely impact Vermont's governing statutory requirements and goals to:
 - Reduce greenhouse gases 50% from 1990 levels by 2028 and 75% by 2050, 10 Vt. Stat. Ann. § 578(a);
 - Supply 25% of all energy use with in-state renewables by 2025, 10 Vt. Stat. Ann. § 580;

⁹⁴ *See* Vermont Department of Public Service, *Comprehensive Energy Plan 2016*, at 2, available at <https://goo.gl/8CxYjU> (90% goal).

- Increase the energy efficiency of 25% of homes by 2020, 10 Vt. Stat. Ann. § 581; and
- Meet 55% of electricity sales with renewable energy by 2017 and 75% by 2032, with 10% coming from small electric generators that are connected to and support Vermont's distribution grid, 30 Vt. Stat. Ann. § 8005(a)(1), (2).

C. Federal Intervention to Prolong the Life of Coal-Fired Power Plants Will Exacerbate the Public Health and Environmental Harms Caused by Such Facilities.

The Proposal's major aim appears to be to halt the market exit and retirement of aging coal-fired power plants. Yet, our states have significantly benefitted from the markets' movement away from coal-fired power plants. With retirements, reduced utilization, and new pollution controls at coal-fired power plants nationwide, air pollution from the power sector has dropped, significantly improving air quality and public health, especially among the elderly, people with respiratory disease, and children.⁹⁵ These improvements include reductions in mercury and other toxic emissions; mercury emissions have fallen 69% since 2000.⁹⁶ In addition, reductions in coal use have helped reduce power sector greenhouse gas emissions that contribute to climate change by 20% since 2005.⁹⁷ The recent reductions in carbon pollution from the power sector—historically the country's largest source of greenhouse gas emissions—are vital to

⁹⁵ See, e.g., U.S. Energy Information Administration, *Sulfur Dioxide Emissions from U.S. Power Plants have Fallen Faster than Coal Generation*, Today in Energy (Feb. 3, 2017), at <https://www.eia.gov/todayinenergy/detail.php?id=29812#> (citing 73% reduction in sulfur dioxide emissions from the power sector between 2006 and 2015); see also MJ Bradley & Associates, *Benchmarking Air Emissions of the 100 Largest Electric Power Producers in the United States*, at 2 (June 2017), available at <http://mjbradley.com/sites/default/files/Benchmarking-Air-Emissions-2017.pdf> ("In 2015, power plant [sulfur dioxide] and [nitrogen oxides] emissions were 87 percent and 79 percent lower, respectively, than they were in 1990.").

⁹⁶ MJ Bradley & Associates, *supra* note 95, at 2.

⁹⁷ See, e.g., U.S. Energy Information Administration, *Carbon Dioxide Emissions from Electricity Generation in 2015 Were Lowest Since 1993*, Today in Energy (May 13, 2016), available at <https://www.eia.gov/todayinenergy/detail.php?id=26232>; MJ Bradley & Associates, *supra* note 95, at 2 ("In 2015, power plant [carbon dioxide] emissions were 20 percent below 2005 levels.").

avoiding the worst effects of climate change⁹⁸ and therefore those reductions provide significant benefits to the states. Prolonging the operation—and air emissions—of coal-fired power plants that would otherwise retire and be replaced by cleaner energy resources would harm our states by threatening this progress in reducing harmful pollution and emissions and would aggravate and worsen the damage to our states that these facilities can cause.

As it did with Order 888, before taking final action on a rulemaking with such significant environmental impacts, the Commission must conduct a full environmental review of the Proposal under the National Environmental Policy Act by preparing an environmental impact statement. *See* 42 U.S.C. § 4332(C).

CONCLUSION

DOE issued the Proposal under section 403 of the Department of Energy Organization Act, a rarely used statutory provision that permits DOE to propose rules for consideration by the Commission. Pursuant to that authority, DOE directed the Commission to take final action on the Proposal within 60 days of its publication of the Federal Register, that is, by December 9, 2017. In light of the numerous pending proceedings before the Commission, in the regional markets,

⁹⁸ EPA has concluded that greenhouse gases, including carbon dioxide, endanger public health and welfare by causing more intense, frequent, and long-lasting heat waves; worse smog in cities; longer and more severe droughts; more intense storms such as hurricanes and floods; the spread of disease; and a dramatic rise in sea levels. *See* Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66,496, 66,497, 66,524-66,525, 66,532-66,533 (Dec. 15, 2009). These effects harm our state residents, infrastructure, and industries, such as farming, tourism, and recreation, as well as the states' wildlife habitats. *See* Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,682 (Oct. 23, 2015). *See also Our Changing Planet: The U.S. Global Change Research Program for Fiscal Year 2017*, at 2 (Nov. 2016), available at <http://www.globalchange.gov/browse/reports/our-changing-planet-FY-2017> (climate-driven impacts include risks to human health; more frequent and intense storms that threaten food security, infrastructure, and livelihoods; sea level rise and coastal flooding; international stability; and U.S. national security).

and in states that seek to strengthen power system reliability and resource adequacy and to examine the fuel security issues raised by the Proposal, and given the lack of legal basis or factual support for any Commission action similar to the Proposal, the undersigned Attorneys General, state agencies, and state consumer advocates urge the Commission to take final action to decline further consideration of the Proposal and its recommended regulatory changes.

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Dated October 23, 2017

Stanton, Kimberly (CONTR)

From: Johnsen, Steven (MA)
Sent: Tuesday, May 15, 2018 7:36 AM
To: Stanton, Kimberly (CONTR)
Cc: Standley, Erica
Subject: FW: Letter from Senator
Attachments: 2018.05.14 Letter to DOE_Defense Production Act-Federal Power Act.pdf

Please log and assign to OE, GC, CI, PA concurrences required. Thanks!

From: Smith, Wayne D
Sent: Monday, May 14, 2018 6:20 PM
To: Johnsen, Steven (MA) <Steven.Johnsen@hq.doe.gov>; Standley, Erica <Erica.Standley@hq.doe.gov>
Subject: FW: Letter from Senator

For the system please.

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From: Burnison, Melissa
Sent: Monday, May 14, 2018 6:14 PM
To: Smith, Wayne D <Wayne.Smith@hq.doe.gov>
Cc: Brouillette, Dan <Dan.Brouillette@hq.doe.gov>; Garrish, Theodore <Theodore.Garrish@hq.doe.gov>; Cunningham, Sean <Sean.Cunningham@hq.doe.gov>; Fibbe, George <George.Fibbe@hq.doe.gov>; Colgary, James <James.Colgary@hq.doe.gov>; McCormack, Brian <Brian.Mccormack@hq.doe.gov>; Wilmot, Dan <Dan.Wilmot@hq.doe.gov>; Bolton, Dwayne S. <Dwayne.Bolton@hq.doe.gov>
Subject: FW: Letter from Senator

Wayne, attached please find a letter re: DPA from Senator Markey.

Melissa F. Burnison
Assistant Secretary
Congressional and Intergovernmental Affairs
U.S. Department of Energy
1000 Independence Ave., SW
Washington, DC 20585
(202) 586-5450
(b) (6) cell

From: Richer, Claire (Markey) [mailto:Claire_Richer@markey.senate.gov]
Sent: Monday, May 14, 2018 6:11 PM
To: Burnison, Melissa <Melissa.Burnison@hq.doe.gov>

Cc: Griffith, Lindsey (Markey) <Lindsey_Griffith@markey.senate.gov>
Subject: Letter from Senator

Hello Melissa,

Senator Markey has written the following letter to Secretary Perry. Please let us know if it has been received.

All the best,

Claire Richer
Legislative Correspondent & Mail Manager
Senator Edward J. Markey
255 Dirksen Senate Office Building
Washington, D.C. 20510
Ph: 202-224-2742

EDWARD J. MARKEY
MASSACHUSETTS

COMMITTEES:

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FOREIGN RELATIONS

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CHAIRMAN:

U.S. SENATE CLIMATE CHANGE TASK FORCE

United States Senate

May 14, 2018

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202-224-2742

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1660 MAIN STREET, 4TH FLOOR
SPRINGFIELD, MA 01103
413-786-4810

The Honorable Rick Perry
Secretary
U.S. Department of Energy
1000 Independence Ave, SW
Washington, DC 20585

Dear Secretary Perry:

Recent reports indicate that you may be considering the use of obscure provisions of law in an effort to move forward with policies designed to, in effect, bail out coal plants on the backs of American consumers. A previous Department of Energy (DOE) proposal with a similar aim, under the guise of preventing a grid reliability emergency, was already unanimously rejected by the Federal Energy Regulatory Commission (FERC).

In September of 2017, DOE tried to direct FERC to take "immediate action...to require organized power markets to value fuel security" by invoking Section 403 of the Department of Energy Organization Act. FERC unanimously concluded DOE's proposal, which would have led to direct federal support for companies that own merchant coal plants, was not necessary and would harm markets and consumers.¹ FERC made clear that ratepayers should not be forced to subsidize generators that can no longer compete in the electricity market. FERC specifically said, "[T]he Proposed Rule would allow all eligible resources to receive a cost-of-service rate regardless of need or cost to the system. The record, however, does not demonstrate that such an outcome would be just and reasonable." FERC went on, "It also has not been shown that the remedy in the Proposed Rule would not be unduly discriminatory or preferential." FERC's decision to reject DOE's proposal was supported by a broad range of stakeholders, including former commissioners, free-market think tanks, environmental law groups, and the natural gas and oil industries.

However, recent reports indicate DOE is considering an emergency rulemaking under Section 202(e) of the Federal Power Act, Section 215A of the Federal Power Act, or the Defense Production Act of 1950, to support coal and nuclear generators. In your hearing before the House Science Committee on Wednesday, May 9th you said that the Department of Energy is "looking very closely at [a] number of ways to approach this." Attempting to move forward with an emergency rulemaking under Section 202(e) of the Federal Power Act, Section 215A of the

¹ Order Terminating Rulemaking Proceeding, Initiating New Proceeding, and Establishing Additional Procedures, 162 FERC ¶ 61,012 (Jan. 8, 2018)

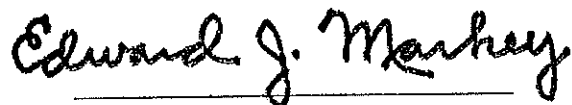
The Honorable Rick Perry
May 14, 2018
Page 2

Federal Power Act, or the Defense Production Act of 1950 to support coal and nuclear generators would not be a proper use of these authorities,

Yet again, a diverse group of stakeholders has urged you to reject these options, including representatives of the natural gas, renewable energy, petroleum oil, independent power plants, and energy efficiency sectors. FERC has already determined that out-of-market payments or subsidies are not appropriate for generators that are not competitive, and the orderly retirement of numerous power plants due to economic reasons does not constitute an "emergency" threat to national security.

I urge you to follow the law and respect the Federal Power Act, and not to attempt to proceed with misusing obscure provisions of law to issue rules to artificially and unnecessarily prop up generators that are no longer competitive.

Sincerely,

A handwritten signature in black ink, reading "Edward J. Markey". The signature is written in a cursive style and is positioned above a horizontal line.

Edward J. Markey
United States Senator

From: Jennifer Lamy
Cc: [AskOE](#)
Subject: Comment: DOE's Use of Federal Power Act Emergency Authority
Date: Thursday, May 17, 2018 10:13:16 AM
Attachments: [BICEP Letter - Comment on use of FPA 202\(c\).pdf](#)

Attached please find comments from Anne Kelly, Senior Director of Policy at Ceres, on behalf of the Business for Innovative Climate and Energy Policy (BICEP) network.

Please direct any questions to kelly@ceres.org.

Thank you,

Jennifer Lamy
Associate, Policy
Ceres
99 Chauncy Street, 6th Floor
Boston, MA 02111
617-247-0700 ext. 199
lamy@ceres.org
www.ceres.org



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Stonyfield Farm
Symantec Corporation
Timberland
Unilever
Vail Resorts
VF Corporation
Vulcan, Inc.
Worthen Industries

May 16, 2018

The Honorable Rick Perry
Secretary
United States Department of Energy
1000 Independence Ave. SW
Washington DC 20585

Dear Secretary Perry,

On behalf of the BICEP (Business for Innovative Climate and Energy Policy) network I write to oppose a recent request from FirstEnergy Solutions Corps (FES) for an emergency order under section 202(c) of the Federal Power Act. Such intervention is not necessary to ensure a reliable electricity supply and will raise costs for ratepayers and American businesses that regularly rely on competitive electricity markets to power their operations. Supporting uneconomic power plants in this manner would also have the effect of slowing the deployment of cost-effective renewable and low-carbon energy in many regions of the United States.

Emergency intervention is not necessary or justified in this case. Section 202(c) is intended for situations involving a sudden increase in energy demand or sudden shortage of energy that threatens the reliable supply of energy to consumers. In August of 2017, however, the Department of Energy itself reported that the increased deployment of renewable energy has not posed a threat to grid reliability.ⁱ Recently, PJM - a regional transmission organization operating in areas of the Midwest, Mid-Atlantic, and Southeast, reported that the anticipated retirement of the three FirstEnergy nuclear plants over the coming year would pose no threat to the reliability of electricity service.ⁱⁱ

Furthermore, the Federal Energy Regulatory Commission (FERC) recently rejected a similar proposal from the Department of Energy, finding that there was no significant evidence of a threat to grid reliability.ⁱⁱⁱ The Commission voted unanimously against the immediate implementation of the Grid Resiliency Pricing proposal, citing information provided by regional transmission organizations (RTOs) and independent system operators (ISOs), states, and other industry experts and instead began a process of defining

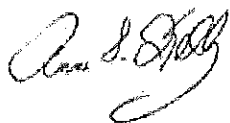
and understanding grid resilience. By attempting to sidestep this ongoing process at FERC, FES is ignoring a large body of evidence against the need for emergency intervention.

Using emergency authority to support FirstEnergy's plants would result in increased costs for electricity customers. As major consumers of energy in the US, companies in the BICEP network - and many others - rely on reasonably priced, readily available energy. Increased costs, which are unnecessary in this case given the reasons above, are passed on to ratepayers, which include not only American households but also major businesses. The proposed order would increase operating costs, such as energy inputs, and raise the cost of production of US goods without any tangible benefit. Competitive energy markets, where they exist, should be allowed to provide solutions that ensure reliability on their own - and they do. In fact, FERC commissioner Rob Powelson said on May 2, 2018 about FirstEnergy's request, "These old inefficient power plants need to retire. You can't have a market when you're sending wrong price signals to people who need to enter and exit."^{iv}

Providing uneconomic plants with arbitrary cost assurances also slows down the transition to and adoption of renewable energy, the cost of which has dropped - and continues to drop - significantly in recent years. Companies in the BICEP network, among others, have made ambitious renewable energy procurement commitments. In fact, nearly half of all Fortune 500 companies have set targets to reduce greenhouse gas emissions, improve energy efficiency, and/or increase renewable energy sourcing. Overall, Fortune 500 companies that have set goals collectively to save nearly \$3.7 billion annually through their clean energy and energy efficiency initiatives.^v Because supporting plants that cannot compete with lower cost energy sources would slow the deployment of increasingly affordable renewable energy, doing so would also harm US businesses.

I welcome the opportunity to discuss this issue further, and respectfully request that you reject the FES request for an emergency order under section 202(c) of the Federal Power Act. Thank you for your time and consideration. Please contact me at kelly@ceres.org if you have any questions.

Sincerely,



Anne Kelly
Senior Director, Policy and BICEP Network
Ceres
99 Chauncy Street, 6th Floor
Boston, MA 02111
T: 617-247-0700 x135
C: (b) (6)
kelly@ceres.org www.ceres.org/bicep

The Ceres BICEP Network comprises influential companies advocating for stronger climate and clean energy policies at the state and federal level in the U.S. As powerful champions of the accelerated transition to a low-carbon economy, Ceres BICEP Network members have weighed in when it has mattered most. For more information on the Ceres BICEP Network, [click here](#).

ⁱ US Department of Energy, *Staff Report to the Secretary on Electricity Markets and Reliability*. 2017. https://www.energy.gov/sites/prod/files/2017/08/f36/Staff%20Report%20on%20Electricity%20Markets%20and%20Reliability_0.pdf

ⁱⁱ PJM Interconnection LLC Transmission Expansion Advisory Committee, *Generation Deactivation Notification Update*. 2018. <http://www.pjm.com/-/media/committees-groups/committees/teac/20180503/20180503-teac-generation-deactivation-notification.ashx>

ⁱⁱⁱ US Federal Energy Regulatory Commission, *Order Terminating Rulemaking Proceeding, Initiating New Proceeding, and Establishing Additional Procedures*. 2018. <https://www.ferc.gov/CalendarFiles/20180108161614-RM18-1-000.pdf>

^{iv} E&E, *FERC's Powelson cautions on use of 1950 law to help coal*. 2018. <https://www.eenews.net/energywire/stories/1060080695/>

^v CDP, Calvert Research and Management, Ceres, and World Wildlife Fund, *Power Forward 3.0: How the largest U.S. companies are capturing business value while addressing climate change*. 2017. <https://www.ceres.org/resources/reports/power-forward-3>

From: Lee Fuller
To: [AskOE](#)
Cc: [Bennett, Shawn](#); [Winberg, Steven](#)
Subject: IPAA Concerns About Initiatives to Address Electric Power Generation Resiliency
Date: Thursday, May 17, 2018 1:52:56 PM
Attachments: [IPAA Letter to DOE Secretary Perry on Resiliency 05-17-2018.pdf](#)

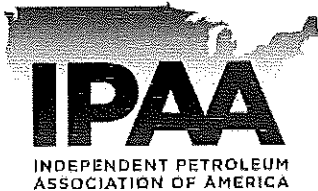
Please find attached a letter from the Independent Petroleum Association of America and other national and state oil and natural gas production industry associations urging the Department of Energy to refrain from imposing any action under the Department of Energy's emergency authorities to provide economic support favoring a particular class of power plants, as proposed by First Energy Solutions and its affiliates. These organizations believe that there is no emergency or threat to the national defense on which the Department could lawfully base the exercise of its emergency authorities. Consequently, we urge the Secretary to focus the Department's efforts on encouraging production and use of all fuels—a result that can only be achieved by rejecting calls to artificially inflate one source over another.

We appreciate the opportunity to supply this information and look forward to working with the Department to find sound solutions to assure the resiliency of the nation's power grid.

Lee Fuller

Executive Vice President

Independent Petroleum Association of America



May 17, 2018

By Electronic Submission

The Honorable James Richard Perry
Secretary of Energy
U.S. Department of Energy
1000 Independence Avenue, S.W.
Washington, D.C. 20585

Secretary Perry:

This letter urges you to refrain from imposing any action under the Department of Energy's emergency authorities to provide economic support favoring a particular class of power plants, as urged by First Energy Solutions and its affiliates. It is submitted on behalf of the Independent Petroleum Association of America (IPAA), the American Exploration & Production Council (AXPC), the Association of Energy Service Companies (AESC), the International Association of Drilling Contractors (IADC), and the following organizations:

Colorado Oil & Gas Association
Florida Independent Petroleum Association
Kansas Independent Oil & Gas Association
National Association of Royalty Owners
Ohio Oil & Gas Association
Oklahoma Independent Petroleum Association
Oklahoma Oil and Gas Association
Pennsylvania Independent Oil & Gas Association
Texas Alliance of Energy Producers
Texas Independent Producers and Royalty Owners Association

Collectively, these groups represent the thousands of independent oil and natural gas explorers and producers, as well as the service and supply industries that support their efforts, that will be the most significantly affected by the actions resulting from this regulatory proposal. Independent producers drill about 90 percent of American oil and gas wells, produce 54 percent of American oil and produce 85 percent of American natural gas.

The signatories ("Independent Producers") support the letter submitted to you on May 7 by a group of natural gas, renewables, and power efficiency groups ("Industry Groups"), detailing the legal infirmities of taking action under Section 202(c) of the Federal Power Act (FPA), the Defense Production Act, and Section 215A of the FPA. As explained in the group's legal analysis:

"There is no emergency or threat to the national defense on which the Department could lawfully base the exercise of its emergency authorities."

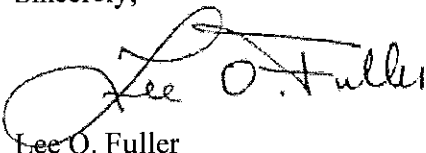
The Independent Producers have succeeded in dramatically increasing production of natural gas, bringing environmental benefits and lower electricity prices. These efforts should not be derailed by an attempt to forestall the retirement of older, uneconomic generators. With the focus on PJM, even PJM Interconnection, LLC, pointed out to the Secretary that the Department does not need to take "precipitous, immediate action" to address the corrective action requested by FirstEnergy Solutions and its affiliates. PJM stated unequivocally that "there is no immediate threat to system reliability," in its March 30, 2017, letter.

As the Industry Groups stated, "FirstEnergy's true problem is not that there is an emergency on the grip, but that its power plants lose money at current prices."

The Federal Energy Regulatory Commission ("FERC") continues to review how Independent System Operators ("ISOs") and Regional Transmission Organizations ("RTOs") manage reliability and resiliency. If changes in the pricing of power are necessary, organized markets can and are working with stakeholders, with the end product being a filing with FERC. Even without a FERC filing, independent system operators and regional transmission operators can find that certain units proposed for retirement are, in fact, necessary for system reliability and offer contracts to keep those plants on line. PJM has not made such a finding with respect to the FirstEnergy generators.

All energy sources have experienced cycles in production and/or demand. The decreased demand for coal and nuclear energy, particularly within PJM, is due in large part to the abundance of lower-cost natural gas and overall decreases in power demand. The Independent Producers urge the Secretary to focus the Department's efforts on encouraging production and use of all fuels—a result that can only be achieved by rejecting calls to artificially inflate one source over another. FERC and the independent system operators can continue with their efforts to ensure the reliability and resiliency of our nation's electric grid.

Sincerely,

A handwritten signature in black ink, appearing to read "Lee O. Fuller". The signature is fluid and cursive, with a large loop at the beginning and a long horizontal stroke extending to the right.

Lee O. Fuller
Executive Vice President
Independent Petroleum Association of America

cc: Steven Winberg, Assistant Secretary for Fossil Energy

Shawn Bennett, Deputy Assistant Secretary for Oil and Natural Gas

May 10, 2018

Honorable Donald J. Trump
President of the United States
The White House
1600 Pennsylvania Avenue
Washington, DC 20500

Dear Mr. President:

On behalf of Citizens Against Nuclear Bailouts — a diverse coalition of Pennsylvania citizens' groups, power generators and energy, business and manufacturing associations — we are writing in opposition to the petition from FirstEnergy Solutions (FES) for an emergency order under the Federal Power Act.

FES' petition is a Hail Mary attempt from an insolvent corporation to acquire a federal government-funded bailout. The company's request comes as a result of its financial mismanagement, and now it expects hardworking Americans to pay more for electricity to continue its operations.

This request from FES is not the first time it has sought federal or state government intervention. It previously tried, to no avail, to acquire subsidies from Ohio consumers and from the Federal Energy Regulatory Commission. Now, FES is asking the federal government to invoke a wartime power to make its business immune to electricity competition. This action undoubtedly would shift increased financial burden onto consumers.

Any federal intervention would contradict this administration's objectives to achieve energy dominance, improve American infrastructure and grow our economy. Granting the order would undermine competition, harming low U.S. energy prices, stifling new investments and innovation, and signaling that the administration favors one form of energy over others.

Should FES nuclear plants be shuttered, the grid would remain reliable and resilient. PJM Interconnection, the regional transmission operator of the electric grid and markets that the FES plants serve, has indicated that closure of the FES plants would not present reliability concerns. Given PJM's critical role in ensuring grid reliability, its assurances are a clear illustration that the closure of FES' plants is not an emergency, as its petition claims.

To be clear, our coalition values all sources of energy, so long as power generation industries compete by the same rules, without government mandates or subsidies.

Energy competition has provided innumerable benefits, including lower electricity prices, to customers and businesses. In Pennsylvania, this has produced a competitive energy marketplace with prices below the national average. Approving FES' request would disrupt the marketplace and increase rates for our seniors, small businesses, manufacturers, transit systems, hospitals, schools, municipal governments and more. These higher energy prices would burden our federal government by increasing operational costs.

Section 202(c) of the Federal Power Act states that an emergency may be declared during the continuance of any war or when a sudden increase or shortage exists. It is not meant to be used to bail out a company that failed to adapt to competition. We trust you will see that this attempt does not require an emergency order and that you will remain committed to protecting energy competition and the free market, which have made our country the envy of the world.

Sincerely,

Citizens Against Nuclear Bailouts

Citizens Against Nuclear Bailouts is a diverse coalition of Pennsylvania citizens' groups, energy consumers, power generators and energy, business and manufacturing associations opposed to any federal or state effort to require consumers to pay higher energy bills to bail out the nuclear energy industry in Pennsylvania.

CC:

Honorable Rick Perry, Secretary, Department of Energy
Chairman Kevin McIntyre, Federal Energy Regulatory Commission
Commissioner Cheryl LaFleur, Federal Energy Regulatory Commission
Commissioner Nell Chatterjee, Federal Energy Regulatory Commission
Commissioner Robert Powelson, Federal Energy Regulatory Commission
Commissioner Richard Glick, Federal Energy Regulatory Commission



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From: Borchers, Dylan
To: AskOE
Cc: "senator@brown.senate.gov"; "senator@portman.senate.gov"; "joyce.beatty@mail.house.gov"; "steve.chabot@mail.house.gov"; "warren.davidson@mail.house.gov"; "marcia.fudge@mail.house.gov"; "bob.gibbs@mail.house.gov"; "bill.johnson@mail.house.gov"; "jim.jordan@mail.house.gov"; "david.joyce@mail.house.gov"; "marcy.kaptur@mail.house.gov"; "robert.latta@mail.house.gov"; "james.renacci@mail.house.gov"; "tim.ryan@mail.house.gov"; "steve.stivers@mail.house.gov"; "patrick.tiberi@mail.house.gov"; "michael.turner@mail.house.gov"; "brad.wenstrup@mail.house.gov"
Subject: Ohio Independent Power Producers - Letter to DOE regarding Federal Power Act Section 202(c) [BRICKER-WS.FID1158350]
Date: Tuesday, May 22, 2018 3:03:45 PM
Attachments: image001.jpg
Ohio IPP Letter Re FirstEnergy Solutions' Request for Emergency Relief under Section 202 of the Federal Power Act and the Defense Production Act of 1950.pdf

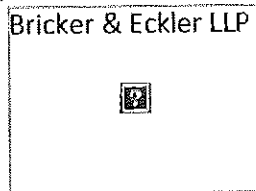
Good afternoon,

The Ohio Independent Power Producers respectfully submits the attached letter to Secretary Perry and the U.S. Department of Energy regarding the recent request by FirstEnergy Solutions for emergency relief under Federal Power Act Section 202(c).

Please do not hesitate to contact me if you have any questions.

Regards,

Dylan



Dylan F. Borchers

Associate

Bricker & Eckler LLP | 100 South Third Street | Columbus, OH 43215

Direct Dial 614.227.4914 | dborchers@bricker.com | [v-card](#) | www.bricker.com

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Smart American Energy in Carroll County



CLEAN ENERGY FUTURE



May 21, 2018

The Honorable James Richard Perry
Secretary of Energy
United States Department of Energy
1000 Independence Avenue, S.W.
Washington, DC 20585

Re: FirstEnergy Solutions' Request for Emergency Relief under Section 202 of the Federal Power Act and/or the Defense Production Act of 1950

Dear Secretary Perry:

The Ohio Independent Power Producers (Ohio IPP), a nonprofit trade association representing the interests of developers and operators of new power plant investments in Ohio, writes to express its strong opposition to the above-referenced request filed by FirstEnergy Solutions and affiliates (FES) on March 29, 2018.¹ FES' request for emergency relief is not needed for grid reliability and will threaten continued private innovation and investment in new generation assets.

- I. The Ohio IPPs are investing billions of dollars in private capital in new, efficient, and reliable generation technology to provide lost-cost energy to millions of consumers.**

The new natural gas power plants in Ohio account for approximately \$10 billion in new private sector investment and the creation of over 14,000 construction jobs. These projects range from those already in commercial operation to projects in the advanced stages of preconstruction development.² The new plants play a critical role in meeting our region's electricity needs, while also driving economies in the communities where we operate. Our projects will generate approximately 10GW of reliable, efficient and clean electricity, powering millions of businesses and homes across the region. More such projects are planned if the competitive market is allowed to function.

¹ Signatories to this letter include the Oregon Clean Energy Center, an 800 MW facility in commercial operations; Carroll County Energy, a 700 MW facility in commercial operations; the Lordstown Energy Center, a 940 MW facility under construction; the Trumbull Energy Center, a 940 MW facility approved by the Ohio Power Siting Board; the Oregon Energy Center, a 955 MW facility approved by the Ohio Power Siting Board; and the Guernsey Power Station, a 1650 MW facility approved by the Ohio Power Siting Board.

² Attached to this letter is a map showing the new natural gas power plant investment in Ohio and the stage of development for each project.

Our projects are also driving significant ancillary infrastructure development, including hundreds of miles of new natural gas transmission pipelines. These infrastructure investments create a platform for additional economic development opportunities for the communities in which we operate.

This investment in new generating facilities has been led by the relatively low cost of natural gas due to the abundant supplies in the Marcellus and Utica shale formations, as well as innovations in gas generation technology increasing plant efficiency. In addition, price signals from the PJM Interconnection's (PJM) competitive markets encourage investment in new generation to replace aging and uneconomic assets. These factors result in low cost production of electricity.

II. Granting FES' request for emergency relief is not needed for grid reliability.

Despite FES' assertions, there is simply no evidence that the retirement of certain FES coal and nuclear facilities will create an "emergency condition" in upcoming years. The North American Electric Reliability Corporation State of Reliability 2017 report found that the United States' Bulk Power System was adequate, with the CEO commenting that the *"state of reliability in North America remains strong, and the trend line shows continuing improvement year over year."* Indeed the U.S. Department of Energy's (Department) own staff report, which preceded the Department's Notice of Proposed Rulemaking in August 2017, concluded that system *"reliability is adequate despite the retirement of a portion of baseload capacity and unique regional hurdles posed by the changing resource mix."*

Moreover, there is no evidence of any potential reliability emergency within the PJM region. PJM maintains reliability of the electric power system within its footprint through market-based mechanisms and has consistently maintained its target reserve margin to serve peak loads. PJM supplements the energy and ancillary service revenues earned by generators in the day-ahead and real-time markets through its Reliability Pricing Model ("RPM") market. The RPM market is a capacity market that ensures there are sufficient capacity resource products available to maintain system reliability. The design of the RPM market has evolved over time, and PJM has demonstrated that it will make modifications to the market design to address changing reliability needs of customers and to ensure that sufficient capacity resources are available to maintain system reliability.³

PJM will also examine the specific impacts to the stable and reliable operation of the grid as a result of the retirement of certain FES coal and nuclear plants. Under its tariff, PJM will conduct a thorough analysis to determine whether the announced retirements will present systemic adequacy issues or any local reliability issues.⁴ In the event that PJM finds that the retirement of an FES plant will result in an adequacy or reliability issue, PJM will address the issue with a variety of tools, including, if necessary, offering full cost-of-service compensation to induce FES' assets to remain online.⁵ Thus far, PJM has

³ For example, PJM proposed further revisions to the RPM market to address potential reliability issues raised by the extremely cold weather experienced in January and February of 2014. PJM proposed to increase the performance incentives for capacity resources to be available when needed most, help reduce price spikes during system emergencies, and reduce the chance of expensive forced outages (the PJM Capacity Performance Proposal). FERC subsequently approved, with modification, the PJM Capacity Performance Proposal.

⁴ See, Part V of the PJM Tariff.

⁵ Further, PJM indicated, in a March 30, 2018 letter to the Department regarding the above-referenced request, that it could join FES' request for emergency relief if PJM's remedial options prove to be insufficient to address a potential adequacy or reliability issues resulting from the retirement of FES' coal and/or nuclear facilities. PJM's

indicated that it does not expect the power plant deactivations planned by FES to adversely affect the reliability of the PJM system.⁶

III. Granting FES' request will undermine new innovation and investment, with the result of harming grid reliability.

PJM has been successful sending appropriate pricing signals to encourage new investment in the market to replace uneconomic assets. As a result, of billions of dollars in new capital has been invested in competitive power generation facilities. Built largely to leverage abundant, domestic shale gas resources, these facilities are generating reliable, around-the-clock power for millions of consumers throughout the PJM region. Interference with the competitive market by granting FES' request, however, would jeopardize the competitive market structure that makes investment in new, efficient technology possible, as well as risk thousands of jobs. Simply put, picking winners and losers fundamentally skews this process and, by default, slows the pace of positive innovation and investment. As a result, consumers will face higher prices.

Indeed, granting FES' request will likely harm grid reliability by chasing away the very innovation and investment in new generation needed to maintain the long-term integrity of the grid.

We urge the Department to maintain the competitive electricity markets and reject the FES' request for emergency relief under Section 202 of the Federal Power Act and/or the Defense Production Act of 1950.

Respectfully submitted,

Apex Power Group

Caithness Energy

Clean Energy Future

Lordstown Energy Center

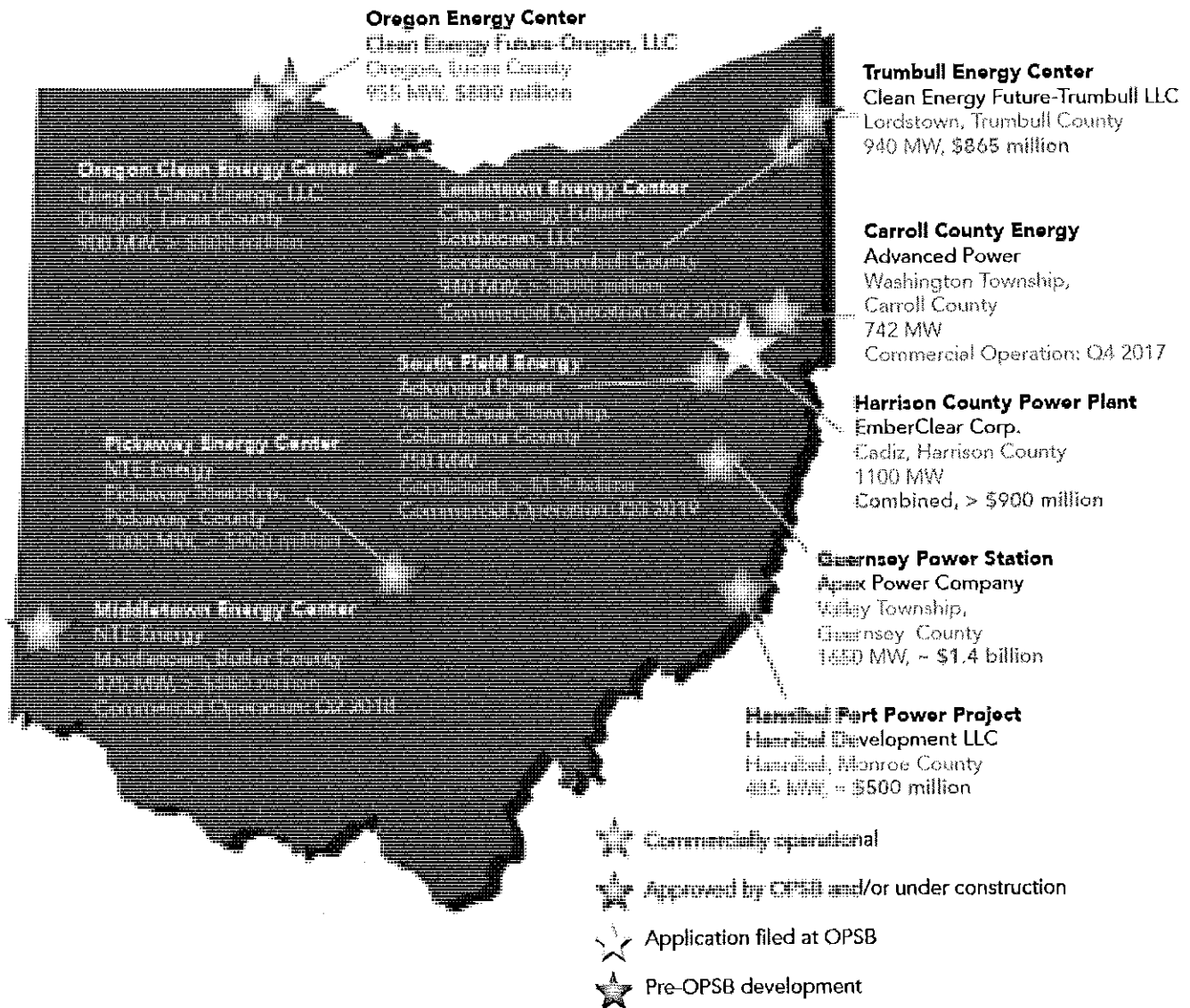
Oregon Clean Energy

Carroll County Energy

cc: Members of the Ohio Congressional Delegation

reasoned explanation highlights that there is simply no need for the Department to take immediate action to grant FES' request.

⁶ See, PJM "Generation Deactivation Notification Update" (May 3, 2018), available at <http://www.pjm.com/-/media/committees-groups/committees/teac/20180503/20180503-teac-generation-deactivation-notification.ashx>.



Compiled by Bricker & Eckler LLP

May 24, 2018

**UNITED STATES DEPARTMENT OF ENERGY'S
USE OF FEDERAL POWER ACT EMERGENCY AUTHORITY**

Comments of Microsoft Corporation

Microsoft Corporation ("Microsoft") appreciates the opportunity to offer these comments on the appropriate use by the U.S. Department of Energy ("DOE" or "the Department") of emergency authority under sections 202(c) or 215A of the Federal Power Act or under the Defense Production Act of 1950. Microsoft believes it is critical that the Department consider the perspective of large corporate energy consumers, such as Microsoft, that actively purchase energy in FERC-jurisdictional markets like the PJM energy market and that require resilient and reliable 24 x 7 energy supply for their operations.

Microsoft uses an increasingly large amount of electricity to power our datacenters throughout the nation, and depends upon a very high degree of reliability in order to meet its always-on uptime commitments to its customers. Microsoft has seen no evidence of the kind of imminent emergency that would warrant DOE's exercise of its emergency authorities. Moreover, there is no basis for invoking the extraordinary step of broad-scale intervention in the operations and price-setting of the competitive wholesale electricity markets. Rather, Microsoft's experience shows that market-based regulatory policies enable the adoption of cost-effective technical innovations that lower consumer costs and enhance grid reliability, without the need for disruptive and unfair out-of-market interventions. We have found that a competitive electricity market structure is essential to driving lowest-cost supply while maintaining reliability. We've also found that a market-based approach best enables our development of innovative approaches that enhance grid reliability, lower costs and also achieve the cleaner generation demanded by our customers.

Microsoft has not seen any evidence to date that an interventionist approach is necessary to improve the resiliency, reliability, or any other aspect of the power system. Instead, Microsoft is deeply concerned that the particularized use of Federal Power Act emergency authorities sought by FirstEnergy

Solutions Corp. (“FirstEnergy”) in its March 29, 2018, Petition to the Secretary, is unwarranted, unnecessary, and unwise for energy consumers and the broader market of energy suppliers. The requested emergency intervention would reward uneconomic facilities and lagging technologies, forcing their subsidization by ratepayers, thus distorting energy markets in ways that will increase energy prices for all consumers, reduce competition, impede innovation, and actually stand in the way of continued expansion of a more resilient and environmentally sustainable grid.

FirstEnergy’s Petition, and the ongoing Federal Energy Regulatory Commission (FERC) rulemaking inquiry on grid resilience and reliability, certainly raise important questions about the ability of the power system to sustain itself during -- and to recover from -- sabotage and natural disasters. Microsoft believes that it is important to air these concerns and ensure they are being addressed. In many cases, companies like Microsoft have already been investing in assets and technologies to help increase the resiliency and reliability of the grid. Continuing the current market-based approach would support such innovation by Microsoft and other players in the energy market. An affordable, reliable, resilient -- and environmentally sustainable -- electricity system is vital to our business, as well to the economic and national security of the United States. Innovation and market operations remain the surest pathway to achieving fuel diversity and a more resilient grid. However, granting relief under the Petition would require the imposition of cost-of-service (“CoS”) regulation on the PJM market, thereby undermining market competition. Accordingly, Microsoft believes that the action requested by the Petition would not advance resiliency or reliability nor help assure energy security for the country.

Microsoft’s long-term energy planning needs benefit from a stable regulatory framework that embraces market-based structures. Competition in PJM and other FERC- jurisdictional power markets has benefited U.S. consumers by providing reliable, affordable electricity service and, more recently, has

facilitated a market-based platform that encourages deployment of innovative and cost-competitive clean energy products and services.¹

Microsoft has deep concerns that granting relief under the Petition would introduce instability into competitive markets that will increase both costs and price volatility for consumers, as well as reduce customer choice -- all undesirable outcomes without gains to grid resiliency.

I. Microsoft's extensive investment in the future of the U.S. power system as a large energy consumer, a clean energy purchaser, and an innovator in energy technology demonstrates the path toward enhanced grid reliability.

Microsoft has three principal areas of interest in the U.S. power sector. *First*, Microsoft is a large electric energy consumer with significant operations in multiple FERC-jurisdictional markets, including PJM. *Second*, this energy powers mission-critical operations for Microsoft, a key element of which is the highly reliable provision of electricity to run our business and meet our commitments to customers. For example, Microsoft's U.S. datacenter operations require a continuous uninterruptible supply of power to run Microsoft cloud services and live up to our always-on commitments to our customers. *Third*, to meet growing customer demands for sustainable products and services, Microsoft has made major public commitments to use power from clean energy sources. To help meet these commitments, Microsoft has announced major investments of its own in clean energy generation, cutting-edge technologies, and partnerships with utilities, all of which benefit from competition in power markets.

The Petition identifies reliability and resiliency as key risks facing PJM, highlighting several extreme weather events that led competitive energy markets to increase temporarily the deployment of baseload coal and nuclear generation – resources that are now faced with eventual phase out as being

¹ Several recent studies from premier academic and market sources have found that competitive power markets provide consumers with billions of dollars in savings of energy supply and services. Not only have competitive markets supported customer planning and reliability needs, but they have also served as a platform for deploying innovative clean energy technologies. See Steve Cicala, "Imperfect Markets versus Imperfect Regulation in U.S. Electricity Generation," University of Chicago, Jan 22, 2017. Available at: http://home.uchicago.edu/~scicala/papers/elec_gov_v_mkt_draft_2.pdf. Also see PJM Interconnection, "Resource Investment in Competitive Markets," May 5, 2016. Available at: www.pjm.com.

uneconomic. The Petition seeks to address the risks of occasional weather events by locking in the use of these baseload generation resources with subsidies, resulting in market-distorting price hikes for energy consumers. There is no credible evidence from any other source that these generators are needed to address reliability or resiliency needs of the PJM market or even that there is a reliability or resilience problem. Instead, Microsoft's own experiences in securing power in the PJM market, which represents one of Microsoft's biggest datacenter regions and hence one of its largest markets for securing power, is that there has not been a reliability or resiliency issue with its own energy procurement. Instead, the PJM market is one where Microsoft has successfully invested in new sources of energy generation and pursued other energy innovations. Microsoft firmly believes that market-based solutions and advanced energy technologies hold the key to increasing energy resilience and security in the United States. Microsoft's own experience has shown that innovations such as demand response, energy storage, and flexible fast-start resources -- resources facilitated by well-structured market operations -- can help increase reliability and resiliency and help prepare the U.S. power system for ever-greater quantities of generation from renewable energy.²

Nor have we seen any first-hand evidence that the growth in renewables or natural gas generation, or other nimble forms of grid resilience management, has resulted in a threat to grid reliability. We believe that this conclusion was borne out by the recent DOE Staff Report to the Secretary on Electricity

² The deployment of renewable energy continues rapidly across the United States, as corporate and public policy drive investment into the industry. According to the Advanced Energy Economy, 71 companies within the Fortune 100 have set public renewable energy or sustainability targets. According to the American Wind Energy Association, corporate and other non-utility customers held more than 50% of new wind power contracts signed in 2015. To put these numbers into context, the Lawrence Berkeley National Laboratory finds that today's existing state Renewable Portfolio Standards (RPS) goals would require more than 60 GWs of new renewables build by 2030 -- the same GW development goals that the Renewables Energy Buyers Alliance has targeted for corporate buyers by 2025.

Markets and Reliability.³ Indeed, on the whole, PJM has demonstrated ample capacity through this mix of resources to meet even its most extreme demand.⁴

Microsoft's innovative power plan for its Cheyenne, Wyoming datacenter shows how highly capable onsite energy systems at our datacenters can be deployed to provide flexible capacity to the grid when needed, bringing new generation resources into the grid in a far more nimble manner. In Cheyenne, Microsoft offered the use of its onsite natural gas backup generators as a secondary resource for the grid.⁵ This helped increase reliability and resiliency for the grid without additional costs for ratepayers, in that it avoided the need for ratepayers to pay for a new power plant or to perpetuate old, uneconomic ones. Microsoft is deeply concerned that were the Petition granted, continued innovation by major energy consumers will be stifled and the motivation for existing power providers to seek out and cooperate with customers in realizing such innovative approaches will be dampened by the perception that extraordinary relief will instead become available.

II. Consumers benefit from competition in power markets, which have provided low cost, reliable power.

U.S. businesses require steady delivery of electricity to maintain their operations, and are also sensitive to energy costs and concerns about power system resiliency. While Microsoft shares the resiliency goals that seem to animate the Petition and FERC's regulatory proceedings on resiliency, we

³ U.S. Dep't of Energy, Staff Report to the Secretary on Electricity Markets and Reliability (August 2017)(*available at* https://energy.gov/sites/prod/files/2017/08/f36/Staff%20Report%20on%20Electricity%20Markets%20and%20Reliability_0.pdf)

⁴ PJM's most recent capacity auction yielded a 23.9% reserve margin, which well exceeds its target of 16.6%. PJM's analysis of the deactivation notice from FirstEnergy regarding the retirement of three units (in 2020 and 2021) found "the deactivation of these generating units is not expected to adversely affect the reliability of the PJM Transmission System due to a combination of remedial measuresWith these measures, the PJM Transmission system will remain reliable, and therefore the generating units listed above may plan to deactivate as scheduled." PJM Comments on 202(c) application (available at: <http://www.pjm.com/-/media/documents/other-fed-state/20180430-motion-to-Intervene.ashx>).

⁵ See Brad Smith, Microsoft's President and Chief Legal Officer, Blog Post (Nov. 14, 2016) ("With our latest energy deal, Microsoft's Cheyenne datacenter will now be powered entirely by wind energy, keeping us on course to build a greener, more responsible cloud.")(available at <https://blogs.microsoft.com/on-the-issues/2016/11/14/latest-energy-deal-microsofts->).

are deeply concerned that the precipitous actions called for could actually undermine resiliency by disrupting the core functions of wholesale markets. In particular, compensating selected generating units via CoS, while other generating units depend upon market-based payments, would disrupt the ability of markets to send accurate, least-cost price signals for new innovative investments. It is also difficult to understand how CoS in FERC-jurisdictional markets such as PJM could result in just and reasonable rates for consumers.

This approach of increased use of CoS in FERC-jurisdictional markets could also trigger recurring requests for policy intervention to prevent retirements by other uneconomic generating units that do not receive cost recovery assurance. Many older generating units that have been retired also faced situations virtually identical to that facing FirstEnergy. Thus, action to provide relief under this Petition seems likely to create an unintentional ‘un-virtuous cycle,’ where costs to consumers become increasingly detached from actual wholesale market prices. Indeed, FirstEnergy’s Petition cites that, “[i]n the past four years, over 11,000 MW of coal-fired generation has closed in PJM, the equivalent of a dozen large power plants.” Petition at 7, 19. The dynamic of an effort to resuscitate uneconomic generation could jeopardize some of the key benefits to consumers afforded by competitive power markets, namely transparent, best-in-price electricity that can be managed through a portfolio or with traditional financial instruments (e.g. hedging). The perception of a non-level playing field may also dissuade new resources from entering the market, thereby hampering the development of the lowest cost energy supply.

In energy-intensive industrial applications, like datacenters, these benefits are essential for maintaining reliable operations and planning new capital investments for our business. The availability of cost-competitive, reliable, market-based electricity rates in a consistent policy environment is a critical factor in Microsoft’s decision-making for developing and siting new datacenter sites. Where policy uncertainty threatens the stability of electricity markets, it undermines the attractiveness of these regions for future economic development.

III. Competitive markets encourage the technology innovation behind a cleaner and more resilient power system.

The very essence of market-based competition is that uneconomic sources of generation get replaced by more economic ones – not that they are simply perpetuated at rate-payer expense, as the Petition seeks. Those sources that are no longer able to compete on an economic basis are appropriately shut down as more economic replacement generation becomes available. That scenario is not an emergency – it is, rather, evolutionary, fully appropriate and beneficial. Competition in FERC-jurisdictional power markets has spurred innovation in a wide range of technologies that support a more resilient grid, including battery storage, fuel cells, and a host of renewable energy technologies. Transparent pricing, market-based services on a level playing field, and technology-neutral market governance in competitive markets represent durable foundations for ongoing innovation.

Conversely, CoS for selected units in competitive markets deviates from the core principle of market-based discovery of costs and value. As a result, relief under the Petition would send inaccurate price signals to consumers about the actual costs and market value of electricity. Among the key benefits of competitive markets is their ability to accurately reflect the least-cost sources of electricity production, such that corporate consumers have visibility into their cost structures and can make informed business decisions about investment and energy technology needs. By extension, accurate pricing sends signals to entrepreneurs and researchers to develop new energy products and services to meet consumer demands. If the power system becomes defined by distorted wholesale prices eroded by non-market CoS intervention within a competitive market environment, and imposes higher non-bypassable price increases on end-users, the resulting economic dynamics would stifle price signals for the development and deployment of innovative energy products and services.

Furthermore, the current competitive market rules overseen by FERC already contain adequate provisions to provide discrete targeted relief in the event there are individual, uneconomic generating

resources that must be retained to avoid unacceptable reliability risks throughout PJM and other competitive electricity markets. PJM and other RTOs/ISOs have the ability to make reliability must run designations of selected resources and FERC has the authority to approve such designations for CoS rates on a year-by-year or shorter basis. These designations are made pursuant to a set of well-developed rules under applicable FERC-approved tariffs. And while no RTO or ISO identified an urgent reliability or resilience problem, FERC, in response to the Secretary's Notice of Proposed Rulemaking on Grid Resilience, is now conducting an inquiry to develop a common understanding of resilience, identify how RTOs and ISOs assess resilience, and examine how RTOs and ISOs mitigate threats to resilience in a market context. Accordingly, there is no need for the heavy-handed imposition of CoS regulation here or independently of FERC's ongoing inquiry.

IV. DOE does not have the authority to invoke emergency powers under the Federal Power Act or the Defense Production Act to address this general, non-exigent market evolution.

The Petition seeks to distort DOE's authorities far beyond the limited relief valve that Congress created under the Federal Power Act. Section 202(c) was not designed to allow the Department to supersede FERC's authority over wholesale rates on a scale that could pertain here and on the basis of a slowly unfolding and fully predictable set of market dynamics. As the Department's own regulations make clear, this provision was designed to address imminent and unexpected, temporary outcomes: "“Emergency,” as used herein, is defined as an unexpected inadequate supply of electric energy which may result from the unexpected outage or breakdown of facilities for the generation, transmission or distribution of electric power.” 10 CFR Part 205.371. The Petition seeks to extend this limited grant to entirely new and largely unbounded circumstances that are otherwise addressed through PJM's and FERC's rulemaking processes and rate structures. It seeks to depict as an emergency the slow evolution of the electric generation market that has been underway for years. Petition at 26-27. Indeed, the only emergency the Petition cites is that facilities “continue to retire prematurely” (Petition at 12) -- hardly the imminent threat the Act and its regulations contemplate.

To the extent that the Petition may identify shortcomings with the regulation of natural gas distribution system reliability as the overall grid has become more dependent upon natural gas generation, Petition at 23 (citing the absence of a NERC equivalent for natural gas), it proposes the wrong cure. The logical remedy for this challenge is to enhance the reliability of the natural gas supply and transportation system and retain dual fuel capabilities, rather than to override competitive energy markets.

Nor does the Defense Production Act provide any other legitimate basis for action. That law, which was enacted in 1950 at the beginning of the Korean War, is designed to authorize rare and extraordinary market interventions critical for pressing national defense needs attendant to a wartime effort. The Defense Production Act does not allow the government to set prices or force market participants to buy products or services they do not wish to buy. 50 U.S.C. App. 2061 et seq.

Similarly, the more recently enacted FAST Act, which added new section 215A to the Federal Power Act, only authorizes the Department of Energy to issue temporary “orders for emergency measures” in response to a “grid security emergency.” A “grid security emergency” is defined as the occurrence or imminent danger of cyberattacks, electromagnetic pulse attacks, geomagnetic storms, and direct physical attacks that would have significant adverse effects on the reliability of critical electric infrastructure. Orders providing for “emergency measures” may last only fifteen days before an additional emergency finding is required. 16 U.S.C. section 215A(a)(7). These circumstances are not presented by the gradual and successful market evolution described by the Petition and the PJM response, nor is the remedy proposed limited in time as contemplated in the FAST Act.

Microsoft urges the Secretary to consider carefully the negative impacts on end-users regarding economic development, technology deployment, and innovation that would come from granting the extraordinary intervention that is being sought. The goals of grid reliability and resilience are better served through the on-going FERC and RTO/ISO regulatory processes that are convening power industry stakeholders to establish the technical and commercial directions necessary to prepare wholesale markets

for an influx of new technologies and consumer preferences that advance reliability and resiliency.

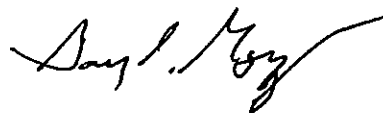
Please do not hesitate to reach out for more information should further perspective be helpful.

Dated: May 24, 2018

Respectfully submitted,

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Counsel to Microsoft Corporation

From: Debra.Bingham@occ.ohio.gov
To: [AskOE](#)
Cc: [Secretary Perry](#); [Walker, Bruce](#); [Jereza, Catherine](#)
Subject: FirstEnergy Solutions Corporation Request for Emergency Action
Date: Thursday, May 24, 2018 5:22:51 PM
Attachments: [QCC Letter.pdf](#)
[QCC MTL.pdf](#)
[QCC Protest.pdf](#)

On behalf of the Office of the Ohio Consumers' Counsel, who represent approximately 4.5 million Ohio residential utility customers, we are submitting the attached transmittal letter, Motion to Intervene and Protest in regard to the Request for an Emergency Order by FirstEnergy Solutions Corporation.

We appreciate the opportunity to address this issue. Please contact our office if you have any questions or concerns.

Thank you.

Deb Bingham

Administrative Assistant

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Office of the Ohio Consumers' Counsel

May 24, 2018

Via Electronic Mail

The Honorable James Richard Perry
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RE: Motion of the Office of Ohio Consumers' Counsel to Intervene

Dear Secretary Perry, Assistant Secretary Walker and Deputy Assistant Secretary Jereza:

Attached is The Office of the Ohio Consumers' Counsel's ("OCC") Motion to Intervene and Protest in the proceeding concerning FirstEnergy Solutions Corporation's ("FES") extraordinary Request for Emergency Action Under Section 202(c) of the Federal Power Act ("Request"). OCC is the statutory representative of residential utility consumers in the State of Ohio, consumers that would be adversely affected if FES' request is granted.

OCC opposes FES' Request for emergency action because there is no emergency and no justification for the relief requested. Additionally, FES' Request would require consumers in Ohio and elsewhere in the PJM region to subsidize FES' (and others) coal and nuclear plants. Requiring customers to subsidize certain coal-fired and nuclear facilities in PJM would also result in unjust, unreasonable and unduly discriminatory rates for Ohio consumers and consumers throughout the PJM region. Subsidizing certain power plants would also undermine the functioning competitive wholesale market that provides consumers reliable electric service at the lowest possible cost.

Correspondence to United States Department of Energy
May 24, 2018
Page 2 of 2

Respectfully Submitted,

Bruce Weston
Ohio Consumers' Counsel

/s/ Kevin Moore
Kevin Moore
Assistant Consumers' Counsel
Counsel for the Office of the Ohio Consumers' Counsel

**UNITED STATES OF AMERICA
BEFORE THE
DEPARTMENT OF ENERGY**

Request for Emergency Order Pursuant)
To Federal Power Act Section 202(c)) DOE Docket No. ____
by FirstEnergy Solutions Corporation.)

**MOTION TO INTERVENE
OF
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

The Office of the Ohio Consumers' Counsel ("OCC") moves to intervene in this matter and urges Energy Secretary Perry to reject the March 29, 2018 Request for Emergency Order, submitted by FirstEnergy Solutions Corporation ("FES"). No emergency condition exists warranting the extraordinary relief FES seeks that would require customers to subsidize certain power plants. Requiring customers to subsidize certain coal-fired and nuclear facilities in PJM would also result in unjust, unreasonable and unduly discriminatory rates for Ohio consumers and consumers throughout the PJM region. Subsidizing certain power plants would also undermine the functioning competitive wholesale market that provides consumers reliable electric service at the lowest possible cost.

I. PROCEDURAL BACKGROUND

On March 29, 2018, FES issued a letter ("Request") to Energy Secretary Perry requesting that the United States Department of Energy invoke emergency authority under Section 202(c) of the Federal Power Act ("FPA") to find that an emergency

condition exists in the PJM Interconnection, L.L.C. ("PJM") regional transmission organization. In its request, FES requests that the Secretary order PJM to enter into contracts with "certain existing nuclear and coal-fired generators" located in PJM for the supply of energy, capacity, and ancillary services to "maintain the stability of the electric grid." FES also requested that the Secretary order PJM to "promptly compensate at-risk merchant nuclear and coal-fired power plants for the full benefits they provide." FES served the Request on numerous affected parties.

II. COMMUNICATIONS

Correspondence and communications concerning the submission should be directed to:

Kevin Moore
Assistant Consumers' Counsel
Office of the Ohio Consumers' Counsel
65 East State St., 7th Floor
Columbus, Ohio 43215
Kevin.Moore@occ.ohio.gov

III. MOTION TO INTERVENE

OCC is the State of Ohio's statutory residential utility consumer advocate. OCC represents the interests of approximately 4.5 million Ohio residential utility customers in proceedings before state, and federal administrative agencies, and the courts.¹ OCC is an active participant in numerous state and federal regulatory proceedings, and represents Ohio residential consumers located within the PJM region. OCC advocates for affordable

¹ See Ohio Revised Code, Chapter 4911.

and reliable utility services at just, reasonable, and nondiscriminatory rates for all residential consumers within Ohio.,

The grant of FES' Request by the DOE would result in unwarranted subsidy payments to certain coal-fired and nuclear facilities in PJM. The cost of those payments likely would be collected from consumers throughout the PJM region, including the Ohio residential consumers that OCC represents. Such payments are likely to significantly increase the retail electricity rates paid by Ohio consumers. OCC opposes FES' Request and reserves the right to supplement this preliminary pleading to explain in detail why the Request should be rejected.

As required by Rule 214(b)(2), OCC states that the DOE's ruling in this matter may have a significant and adverse effect on the rates paid by Ohio's residential utility consumers. OCC moves to intervene² in this matter to protect the interests of these Ohio residential consumers who could be directly and adversely affected by this proceeding. As the statutory representative of Ohio residential consumers, OCC has a direct and substantial interest in this proceeding. No other party can represent this interest. OCC's intervention in this proceeding is in the public interest. OCC should be granted intervention as a party with all of the rights appurtenant to that status.

IV. STATEMENT OF OPPOSITION

As required by Federal Energy Regulatory Commission ("FERC") Rule 214(b)(1), the OCC's preliminary position on FES' Request is that OCC opposes granting the relief FES seeks. The available evidence (not cited in FES' Request but well documented in the comments submitted by OCC and other parties in FERC Docket No. RM18-1-000)

² See Rule 214 of the FERC's Rules of Practice and Procedure.

demonstrates that no emergency condition exists. The available evidence also demonstrates that the requested relief is unnecessary, would result in an unreasonable increase in rates paid by consumers, a less reliable electric grid, and damage to the functioning competitive wholesale market that provides consumers reliable electric service at the lowest possible cost.

V. CONCLUSION

For the foregoing reasons, OCC requests that (a) its motion to intervene be granted; (b) it be permitted to participate in this proceeding with full rights as a party; and (c) DOE reject FES' request for extraordinary emergency relief.

Respectfully submitted,

BRUCE WESTON
OHIO CONSUMERS' COUNSEL

/s/ Kevin Moore

Kevin Moore
Assistant Consumers Counsel

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Dated: May 24, 2018

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document by electronic transmission on the unofficial service list for this matter.

Dated at Columbus, Ohio this 24th day of May 2018.

/s/ Kevin Moore

Kevin Moore

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**UNITED STATES OF AMERICA
BEFORE THE
DEPARTMENT OF ENERGY**

| | | |
|---------------------------------------|---|----------------------|
| Request for Emergency Order Pursuant |) | |
| To Federal Power Act Section 202(c) |) | DOE Docket No. _____ |
| by FirstEnergy Solutions Corporation. |) | |

**PROTEST
OF
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

To protect Ohioans (and others) from paying subsidies and above-market prices for electricity, the United States Department of Energy (“DOE” or “the Department”) should reject the Request for an Emergency Order (“Request”) submitted by FirstEnergy Solutions Corporation (“FES”) on March 29, 2018. That request would require consumers in Ohio and elsewhere in the PJM Interconnection, LLC (“PJM”) region to subsidize the coal and nuclear plants of FES and others. Requiring customers to subsidize certain coal-fired and nuclear facilities in PJM would inflict unjust, unreasonable and unduly discriminatory rates on Ohio consumers and consumers throughout the PJM region. Subsidizing certain power plants (and not others) would also undermine the functioning competitive wholesale market that provides consumers reliable electric service at the lowest possible cost.

FES’ extraordinary Request is based on the flawed assumption that the PJM electric grid will collapse without coal and nuclear resources, and consumers will experience blackouts and energy supply shortages. Nothing could be further from the truth.

To the contrary, PJM (the entity charged with the responsibility for keeping the lights on in the PJM region) flatly rejected FES' Request, stating that "without reservation there is no immediate threat to system reliability."¹ PJM reliably operates the grid, and has more than adequate supplies available to reliably serve consumers into the foreseeable future. Just three months ago, the Federal Energy Regulatory Commission ("FERC") agreed with PJM's assessment when it terminated another docket (Docket No. RM18-1-000), regarding essentially the same relief FES seeks here. FES did not seek rehearing of that ruling, and its filing here is an unjustified collateral attack on that ruling.

FES' extraordinary request is also fundamentally unjust and unreasonable for consumers. It comes at a time when market prices for electricity are low due in large part to the abundant supplies of natural gas that exist today in PJM. Consumers in Ohio and elsewhere in PJM are beginning to see lower prices for electricity from market-based pricing – after electric suppliers like FES received much higher market prices that prevailed during the 2000's. All markets experience price swings as a result of changes in economic conditions, market fundamentals, and technological advancements.

FES essentially seeks to secure profits for shareholders during the "good times" (when market prices are high) and secure subsidies from customers for shareholders during the "bad times" (when market prices are low). In this respect, FES's Request would create a perverse ratemaking formula where Ohioans and other PJM electric customers always would pay the higher of market-based or cost-based rates. And this result would subvert PJM's functioning competitive markets that provide consumers

¹ PJM Letter to Secretary Perry re FES' Request for Emergency Relief under Section 202 of the Federal Power Act at 1 (March 30, 2018).

reliable electric service at the lowest possible cost. The U.S. DOE should reject the extraordinary subsidy that FES seeks from consumers.

FES claims a concern for the reliability of the U.S. electric grid. But its real concern is that low prices for natural gas in PJM's markets have caused FES' coal-fired and nuclear resources to be uneconomic. Indeed, FES filed for bankruptcy just days after it filed its Request in this proceeding. FES' financial woes, however, are not the type of emergency Congress envisioned when it provided the DOE emergency powers regarding electricity supply.² In order to protect the residential energy consumers in Ohio, OCC requests that DOE refrain from taking the unprecedented action sought by FES. FES' Request should be rejected.

A. The DOE has no legal means to approve wholesale power contracts between PJM and the power plant owners and charge those rates to customers as FES requests.

FES requested that the DOE order PJM to enter into cost-based contracts with the owners of every coal and nuclear plant in the region. If the parties are unable to reach agreement on the amount of the subsidies, FES requests that the Secretary determine the compensation amount. But there is no legal mechanism by which the DOE could grant FES' Request.

PJM could negotiate contracts with each coal and nuclear plant in the region to compensate it for its cost of providing service. But those contracts are subject to a determination that the plant is needed for reliability under PJM's existing Open Access Transmission Tariff. The contracts are also subject to FERC's regulatory oversight to

² 16 U.S.C. § 824a(c); *see also* Department regulations, 10 C.F.R. § 205.371 (“[s]ituations where shortage of electric energy is projected due solely to the failure of the parties to agree to terms, conditions, or other economic factors relating to service, generally will not be considered emergencies unless the inability to supply electric service is imminent.”).

ensure that the rates produced in such contracts are just and reasonable under Section 204 of the Federal Power Act, 16 U.S.C. § 824d.

The courts have long held that FERC (and not DOE) has the exclusive regulatory authority to set wholesale electric rates.³ The law provides FERC the same rate-setting authority under Federal Power Act Section 202(C) requests for emergency relief from the DOE.⁴ There is no legal authority for DOE to circumvent and subvert FERC's jurisdiction over the wholesale electric rates for these resources.

B. There is no emergency or threat to Ohio or other PJM consumers that would justify the emergency action sought by FirstEnergy Solutions.

FES requests that the DOE take the unprecedented step of declaring an emergency. But there is no emergency. FES does not claim that consumers' lights have gone out due to shortages in energy supplies in the PJM region. Nor does FES claim that consumers' lights are likely to go out in the foreseeable future. In fact, the opposite is true. PJM's markets operate on a three-year forward procurement basis. That means that PJM has already procured today all of the capacity it needs to reliably serve customers through May of 2022.

In each year since PJM first began electric market operations, its markets have procured significantly more resources than were needed to reliably serve customers,

³ *Hughes v. Talen*, 136 S.Ct. 1288, 1291 (2016) ("The Federal Power Act (FPA), 41 Stat. 1063, as amended, 16 U.S.C. § 791a *et seq.*, vests in the Federal Energy Regulatory Commission (FERC) *exclusive jurisdiction over wholesale sales of electricity in the interstate market.*") (emphasis added).

⁴ See 10 C.F.R. § 205.376 ("The applicant and the generating or transmitting systems from which emergency service is requested are encouraged to utilize the rates and charges contained in approved existing rate schedules or to negotiate mutually satisfactory rates for the proposed transactions. In the event that the DOE determines that an emergency exists under section 202(c), and the "entities" are unable to agree on the rates to be charged, **the DOE shall prescribe the conditions of service and refer the rate issues to the Federal Energy Regulatory Commission for determination by that agency in accordance with its standards and procedures**") (emphasis added).

including this year and each of the next three years.⁵ In the May 2018 PJM capacity auction, PJM's capacity market procured 163,627 megawatts ("MW") of capacity for the delivery period 2021/2022. That capacity is for serving customers under a projected peak demand of 152,647 MW,⁶ resulting in a reserve margin above the level needed in excess of 21%.⁷ Additionally, there are significant quantities of new electric capacity entering the market each year, with more than 51,000 MW of new generating capacity entering the market since 2006.⁸ The net of additions reached more than 24,000 MW over that period.⁹ Contrary to FES' allegations, the reliability of the electric supply in the PJM region is simply not a concern for consumers.

The resilience of PJM's portfolio of supplies is also not a cause for concern for customers. PJM's 2017 Fuel Mix report demonstrates that the grid would be operationally reliable for customers even with 86% of its generator fuel mix comprised of natural gas generating plants.¹⁰ Additionally, PJM's analysis of the reliability attributes of the different types of power plants on its system shows that natural gas plants provide for customers almost the same level of flexibility as coal plants, and provide significantly greater flexibility than nuclear plants.¹¹ While PJM acknowledges that more work should

⁵ 2021/2022 PJM RPM Base Residual Auction Results at 6, available at <http://www.pjm.com/-/media/markets-ops/rpm/rpm-auction-info/2021-2022/2021-2022-base-residual-auction-report.ashx>.

⁶ *Id.* at 26.

⁷ *Id.* at 6.

⁸ *Id.* at 20.

⁹ *Id.*

¹⁰ PJM's Evolving Resource Mix and System Reliability at 5, PJM Interconnection, LLC (March 30, 2017) ("Fuel Report"), available at <http://www.pjm.com/-/media/library/reports-notice/special-reports/20170330-pjms-evolving-resource-mix-and-system-reliability.ashx>.

¹¹ Fuel Report at 16; *see also Grid Resilience in Regional Transmission Organizations and Independent System Operators*, Docket No. AD18-7-000, Comments and Responses of PJM Interconnection, L.L.C. at 71 (March 9, 2018) ("PJM Comments").

be done to improve the resilience of its system for customers, it maintains that the electric grid in its region “is safe and reliable today – it has been designed and is operated to meet all applicable reliability standards.”¹² The extent of the additional work needed to continue to provide consumers reliable service is the subject of FERC’s inquiry in Docket No. AD18-7-000. There is no evidence that would justify the DOE taking the unprecedented step of short-circuiting that process which assures consumers of reliable service.

Finally, FES’ claim that an emergency exists because PJM relied on coal and nuclear plants to provide customers service during the severe winter weather (in the first week of January 2018) is based on a flawed premise. FES is correct that PJM dispatched coal and nuclear resources to serve customers during the extreme winter weather in January 2018. However, the implication in FES’ statement that these plants were needed to serve customers because PJM had no other available sources of supply to serve customers is incorrect. FES fails to distinguish between dispatch and availability of resources for providing customers service.

PJM dispatched coal and nuclear resources in early January to serve customers because they were the lowest cost resources available during that severe “cold snap” when natural gas prices were quite high, not because it had no other sources of supply available. PJM had 137,939 MW of on-line generation during that period,¹³ and experienced 23,751 MW in capacity outages (29% of which were coal units),¹⁴

¹² PJM Comments at 4.

¹³ PJM Cold Snap Performance Dec. 28, 2017 to Jan. 7, 2018 at 13, PJM Interconnection (Feb. 26, 2018) (“Cold Snap Report”), available at <http://www.pjm.com/-/media/library/reports-notice/weather-related/20180226-january-2018-cold-weather-event-report.ashx>.

¹⁴ Cold Snap Report at 2.

accounting for 161,000 MW of PJM's total procured capacity for this past year of 167,000 MW.¹⁵ This means PJM still had more than 5,000 MW in procured capacity available if needed to serve customers.

More importantly, PJM had more than 187,473 MW of capacity in the region eligible to bid into the market for serving customers during the 2017/2018 time period.¹⁶ Some of the excess capacity may have been available for dispatch in addition to the excess 5,000 MW of procured capacity still available. PJM's study of its operations during that extreme cold weather event concluded that the grid "is diverse and strong and remains reliable" for customers.¹⁷ In other words, the market worked *exactly* as it was supposed to, providing customers with reliable electricity at the lowest possible cost.

C. FirstEnergy Solutions' Request ignores the existing, more targeted, and less expensive solution for Ohio and PJM consumers available in PJM's Tariff in the form of Reliability Must-Run contracts.

PJM has an existing mechanism for compensating resources at risk of retirement that are needed to reliably serve customers, Reliability Must Run ("RMR") contracts.¹⁸ FES noted in its Request that it had already announced to PJM that it planned to retire certain of its coal and nuclear resources. PJM indicated in its response to FES' Request in this proceeding that it is currently studying those notices and plans to issue a determination in the near future as to whether any of those generating plants are needed to reliably serve customers.

¹⁵ 2017/2018 RPM Base Residual Auction Results at 8, available at <http://www.pjm.com/-/media/markets-ops/rpm/rpm-auction-info/2017-2018-base-residual-auction-report.ashx?la=en..>

¹⁶ 2017/2018 RPM Base Residual Auction Results at 20.

¹⁷ Cold Snap Report at 1.

¹⁸ PJM Open Access Transmission Tariff, Section 113.

If PJM determines that the resources are needed for providing reliable service for customers, it will enter into RMR contracts, subject to FERC's regulation. Under RMR contracts the generation owner is paid its full costs for keeping the plants open. Thus, PJM already has all the tools it needs to ensure the reliability of the grid for customers without the DOE stepping in and ordering it to enter into such contracts. If needed, this existing tool can be used and is likely to cost consumers significantly less than the FES Request. This is because RMR contracts are executed only for those resources actually needed for reliability and only for limited amounts of time. FES's proposal on the other hand has nothing to do with what resources are actually needed to provide customers reliable electric service. Moreover, the RMR process comports with FERC's primary statutory responsibility, which is to provide consumers a "complete, permanent, and effective bond of protection from excessive rates and charges."¹⁹

D. FirstEnergy Solutions' Request, if granted, would result in a less reliable electric grid for consumers in Ohio and other parts of PJM.

Granting FES' Request would retain a significant quantity of uneconomic coal and nuclear resources in PJM that are not needed for providing reliable service to customers and that would otherwise retire. To customers' detriment, retention of these resources in PJM's competitive wholesale markets is likely to force other resources, which are economically viable, to leave the PJM market, or to discourage investment in new, more efficient generating plants.

PJM studies have shown that the average forced outage rate for generating plants at risk of retirement is 35%, which is significantly higher than the four percent system

¹⁹ *Atl. Ref. Co. v. Pub. Serv. Comm'n*, 360 U.S. 378, 388 (1959) (the FERC has an obligation to provide consumers a "complete, permanent, and effective bond of protection from excessive rates and charges.")

average forced outage rate for all resources on the system.²⁰ Thus, the retention of uneconomic resources that are at risk of retirement is likely to leave the PJM electric grid less reliable for customers, not more reliable. This would be bad for PJM consumers, including Ohio consumers. The DOE should reject FES' effort to bail itself out of bankruptcy by disrupting or destroying functioning electricity markets with customer-funded subsidies for uneconomic coal and nuclear plants. These FES power plants are on the verge of retirement and are less reliable for providing service to customers than the newer resources they would replace. The Request would unreasonably increase utility bills for millions of Ohio consumers.

E. CONCLUSION

OCC requests that the DOE reject the FES Request in order to protect Ohio consumers and consumers generally from paying subsidies and above-market prices for electricity in the PJM region. There is no evidence of a dire emergency that would justify the extraordinary relief FES seeks in this proceeding.

Respectfully submitted,

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²⁰ 2016 Winter Report at 1, PJM Interconnection, LLC (May 31, 2016), available at <http://www.pjm.com/~media/committees-groups/committees/oc/20160607/20160607-item-15-2015-16-winter-report.ashx>.

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document by electronic transmission on the unofficial service list in the matter.

Dated at Columbus, Ohio this 24th day of May 2018.

/s/ Kevin Moore

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